

**DIGGING DEEPER FOR HEALTH  
AND SAFETY: EXAMINING NEW  
STANDARDS AND PRACTICES  
IN MINING**

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**HEARING**

**[BEFORE THE]**

**SUBCOMMITTEE ON EMPLOYMENT  
AND WORKPLACE SAFETY  
COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS  
UNITED STATES SENATE**

**ONE HUNDRED EIGHTEENTH CONGRESS**

**SECOND SESSION**

**MAY 22, 2024**

Printed for the use of the  
Committee on Health, Education, Labor, and Pensions



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LABOR, AND PENSIONS  
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ON  
EXAMINING NEW STANDARDS AND PRACTICES IN MINING, FOCUSING  
ON HEALTH AND SAFETY

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**DIGGING DEEPER FOR HEALTH  
AND SAFETY: EXAMINING NEW  
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**Wednesday, May 22, 2024**

U.S. SENATE,  
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room 430, Dirksen Senate Office Building, Hon. John Hickenlooper, Chairman of the Subcommittee, presiding.

Present: Senators Hickenlooper [presiding], Casey, Kaine, Luján, and Braun.

**OPENING STATEMENT OF SENATOR HICKENLOOPER**

Senator HICKENLOOPER. Let's try that again. This will happen to each of you, I guarantee you, over the course of—or one of you at least. The Subcommittee on Employment and Workplace Safety will come to order.

Today, we are here for an important discussion about mining health, mining safety. Ranking Member Braun and I will each give an opening statement, then we will introduce the witnesses. After the witnesses give their testimony, Senators will have 5 minutes for a round of questions.

We have for long—for a long time, we have relied on our miners to help us keep the lights on, and we owe it to them to make sure that they have a safe and healthy workplace. And that is why we are here today, to talk about what is needed to best protect our miners, both today and in the future.

For generations, we have relied on resources like coal, uranium, copper to fuel our economy, to run electrical generators, to support infrastructure and power—not just manufacturing but all aspects of our society.

We know that the work to extract these resources could be dangerous without good and consistent safety measures in place. Thousands of miners have contracted and died from preventable diseases like black lung and silicosis.

Our miners deserve safety protection in their workforce and their workplace, just like any other job. Our Country, I think, is at the cusp of, I call it a great transition. We are gearing up for a clean

energy economy to help secure energy independence and to address climate change in a pragmatic and real way.

As we make this new transition, I think it is an exciting time. We have to make sure that miners are not left behind. These workers are going to be as important, probably more important than they ever have been.

We are going to need critical minerals like cobalt and graphite to build electric vehicles, to build wind turbines, and to support nuclear power, but we are going to have to work and fast for some of these minerals we currently don't have close to enough for what we anticipate will need. For others, our processing options are too long.

Our supply chains are too concentrated, really. We need to strike the right balance to procure these important resources responsibly and protect both our communities and our workers. That means ensuring health and safety standards and supporting new mining safety technologies.

We need to build trust and strengthen workforce pipelines for the mining industry all together. Now, we can do this by taking steps to proactively protect our miners and making sure that the mines that we create are safer, safer than they have ever been. And these actions should look like mitigating exposure to the irritants that cause preventable mining illnesses like black lung and silicosis.

What start out as irritants, over a period of year, lead to these insidious diseases. We need to make sure that Federal benefits, like those available under the Black Lung Benefits Program and the Radiation Exposure Compensation Act, are available to the workers who need them.

We should be exploring how we can make sure that workplace safety resources, like real time dust sampling technologies, are accessible to workers and employers around the country. I appreciate Ranking Member Braun for working with us to host this hearing.

I also want to thank Senators Kaine and Casey for their collaboration on this issue that they both have worked on so hard, and both know so well. In many cases, their constituents have been side by side with them.

With that, I will recognize Ranking Member Braun for his opening statement and to introduce our first witness.

#### OPENING STATEMENT OF SENATOR BRAUN

Senator BRAUN. Thank you, Mr. Chairman, and the witnesses here today. With today's hearing, we are looking at a profession that is tremendously beneficial to our society, but one that is not without risks and hazards for those who work in and around it.

My home State of Indiana is one of the top coal producing states in the country. I understand the importance of ensuring working conditions for American miners that are safe and as healthy as they can be.

In the past, I have been proud to champion mining legislation that became law with Senator Casey, the Stream Act, which ad-

dressed the safety and environmental hazards of abandoned mine lands.

This bill made it easier for states to maintain treatment systems for the release of highly acidic water from abandoned mines, which pose a threat to those that work and live around those areas.

Black lung disease also poses a significant threat to those in the mining industry. In 1969, Congress passed legislation to provide compensation for miners suffering from black lung disease and later established the Black Lung Disability Trust Fund.

This fund pays out benefits to coal workers and their families in the unfortunate cases when they become afflicted with the disease. In Indiana, there were nearly 19,000 black lung compensation claims filed in Fiscal Year 2023, and that number is significantly higher in places like Kentucky and West Virginia.

It is important that this fund remain financially stable to provide for affected miners and their families. In the past, this fund has been grossly mismanaged where its total liabilities exceeded its assets by billions of dollars. It is no good. It is not going to be there for the people that need it.

Following recommendations from the GAO, past administrations have taken concrete steps to enhance oversight and improve the trust fund's financial position. Unfortunately, those efforts have run into hurdles in recent years.

This is simply unacceptable, and vigorous oversight from Congress is needed to ensure that this fund is properly administered and remains solvent in the long run. I look forward to hearing the perspective of our witnesses and giving these issues that are critically important for miners in the coal industry the attention they deserve with this hearing.

Move to witness introduction. I will start or you——

Senator HICKENLOOPER. Please begin.

Senator BRAUN. I would like to introduce Mrs. Cindy Brown Barnes, who serves as Director of the Government Accountability Office's Education, Workforce, and Income Security team.

Mrs. Brown Barnes has over 30 years of service performing financial, forensic, and performance audits of Federal agencies and programs. We welcome her expertise to this panel. Thank you for being here. I yield back, Mr. Chairman.

Senator HICKENLOOPER. Now I have great pleasure in turning it over to Senator Kaine to introduce our next witness, Dr. Drew Harris.

Senator KAINE. Thank you, Mr. Chairman and Ranking Member Braun. And it is great to welcome all the witnesses.

Even though I am not charged with introducing Cecil Roberts, I just have to say that there is not a better labor leader in this country not only today but during the history of the labor movement than my friend Cecil Roberts, and I am so glad you are here with us.

Now, my job is to introduce a great Virginian, Drew Harris. Dr. Drew Harris is the Medical Director of the Black Lung Program at

Stone Mountain Health Services, which is a federally qualified health center in Southwest Virginia.

It is the only FQHC that has a black lung clinic in the Commonwealth of Virginia, and it is the largest in the country with about 2,000 coal miners seen there annually. As Medical Director, Dr. Harris provides medical and—medical legal consultations and oversees the Pulmonary Function Lab and the Pulmonary Rehabilitation Program.

Dr. Harris also serves as the Associate Program Director in the University of Virginia's Internal Medicine Residency Program. He founded and directs the Health Equity, Advocacy, and Leadership Track Program and coordinates community partner medicine programs in collaboration with community partners including the Charlottesville Free Clinic and The Haven, which is a homeless shelter and resource center.

He teaches UVA residents seminars on physician advocacy, black lung disease, rural health, and a practical approach to the social drivers of health. He is also the co-principal investigator on a research study that brings seven black lung clinics around the country together to better understand the mental health of coal miners.

He is the first editor in chief of a publication called Chest Advocates, focusing on practical approach to physician advocacy in the pulmonary space. I am so grateful for the work that he does, and I am so grateful, Dr. Harris, that you are joining us today.

Senator HICKENLOOPER. Thank you. And now I will have the responsibility and the opportunity to introduce I would say not just one of the great leaders in organized labor, but certainly—perhaps the greatest leader, how is that? Yes, I can't let him outdo me.

[Laughter.]

Senator HICKENLOOPER. Mr. Cecil Roberts is the President of the United Mine Workers of America. And having been a coal miner himself, President Roberts has an extensive background with the mining industry.

He helps the union's more than 50,000 members navigate Federal and statewide mining benefits programs while advocating for health and safety reforms. He is also on top of a level of detail that most leaders don't. He has chastised me at one point when we first met about not having gotten a tour of the Ludlow site.

Luckily I was back on my toes and could quote back to him Ron Chernow's book, *Titan*, how the Ludlow massacre in Colorado actually transformed the Rockefeller family from being titans and magnets, worried about their business, into focusing completely on creating a foundation that could make the world a better place.

It is unfortunate it takes sometimes a tragedy to create that—act as that kind of a catalyst. Then I also have a great—I can't—I won't be able to put on quite the superlatives just because I haven't been challenged by another Senator, but we are very grateful to have Doctor Steve Schafrik here.

He is the Associate Professor and Director of Graduate Studies in the Mining Engineering Department at the University of Kentucky, one of the great schools around mining technology and mining education in the country.

There, he leads research about mining technologies, including mine automation, ventilation, and mine dust filtering, obviously which all have an efficiency aspect, but a real bearing on the health of the miners.

Anyway, why don't we go down and start with Ms. Barnes, and you can give your opening testimony, and we will go down in order.

**STATEMENT OF CINDY BROWN BARNES, MANAGING DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY, GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC**

Ms. BARNES. Chairman Hickenlooper, Ranking Member Braun, and Members of the Subcommittee, I am pleased to be here today to discuss, one, the serious financial challenges facing the Black Lung Disability Trust Fund.

Two, GAO's prior recommendations concerning the Department of Labor's limited oversight of coal mine operators' self-insurance. And three, updated actions that the Department has taken to improve oversight of self-insurance and implement our recommendations.

My testimony is based primarily on GAO reports from 2018 through 2021. The Black Lung Benefits Program provides cash and medical assistance to coal miners who are disabled due to black lung disease.

Over 23,000 beneficiaries received benefits during Fiscal Year 2023. Black lung benefits are generally paid by liable coal mine operators. Operators may purchase commercial insurance or self-insure to cover the benefits.

The Federal Government's Black Lung Disability Trust Fund pays benefits when no responsible mine operator can be identified, or the liable mine operator doesn't pay, such as in the case of a bankruptcy.

Our domestic coal tax is a primary source of revenue. This brings me to my three discussion points. First, the trust fund has serious financial challenges, with expenditures consistently exceeding revenue, especially its debt and interest repayments.

Consequently, the trust has borrowed from the Treasury almost every year since 1979. In Fiscal Year 2023, the trust fund had to borrow \$2.7 billion to cover its expenses, and based on Department of Labor's projection, the trust debt could exceed \$13 billion by 2050.

Compounding these challenges, coal operated bankruptcies have further strained the trust fund. We previously reported that bankruptcies between 2014 and 2016 of self-insured operators led to the transfer of \$865 million and benefit responsibility to the trust.

Since then, at least five more self-insured operators have filed for bankruptcy. Making things worse, there has been an increased occurrence in the number of miners contracting the most severe form of black lung, likely leading to increased future liabilities.

Now, on to my second point. In response to the department's limited oversight of coal mine operator insurance, we made two priority recommendations for Labor to, one, develop procedures for self-insurance renewal that clarify how long an operator is author-

ized to self-insure, as well as when the self-insurance authority would not be renewed.

Two, that they developed procedures for self-insured operator appeals. Both of these recommendations remain open. Now for my third point, when we testified in February 2020, we noted that the Department of Labor had begun implementing a new process for self-insurance that, if implemented effectively, might have helped address past deficiencies and our recommendations.

That didn't happen. DOL said their ability to resolve appeals was hindered by the COVID-19 pandemic, as they and coal operators adjusted to different working conditions and also experienced challenges in processing documentation.

As a result, the department suspended its reviews of operator appeals. However, in January 2023, the department issued a notice of proposed rulemaking that would, among other things, require all self-insured coal mine operators to post security to cover at least a 120 percent of their total estimated current and future liabilities.

The Department of Labor is also proposing changes to the self-insurance application, the renewal, and the appeals processes. Labor submitted its final draft rule to OMB for review earlier this month.

The department's rulemaking effort, once completed, and if implemented effectively, may address our open recommendations. Given the dire situation facing the trust fund, we reiterate the need for the Department of Labor to complete action on its proposed rule, address our priority recommendations, and effectively oversee the program.

This completes my prepared statement. I will be happy to entertain and look forward to your questions.

[The prepared statement of Ms. Barnes follows.]

PREPARED STATEMENT OF CINDY BROWN BARNES



United States Government Accountability Office

Testimony  
Before the Subcommittee on  
Employment and Workplace Safety,  
Committee on Health, Education, Labor  
and Pensions, U.S. Senate

For Release on Delivery  
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**BLACK LUNG BENEFITS  
PROGRAM**

Lack of Resolution on Coal  
Operator Self-Insurance  
Increases Financial Risk to  
Trust Fund

Statement of Cindy Barnes, Managing Director,  
Education, Workforce, and Income Security

## GAO Highlights

Highlights of [GAO-24-107597](#), a testimony before the Subcommittee on Employment and Workplace Safety, Committee on Health, Education, Labor and Pensions, U.S. Senate

### Why GAO Did This Study

The Trust Fund, which pays benefits to coal miners disabled due to black lung, faces financial challenges. It has borrowed from the U.S. Treasury's general fund almost every year since 1979 to make needed expenditures. In February 2020, GAO found that DOL's limited oversight of coal mine operator insurance exposed the Trust Fund to additional financial risk.

This testimony is based on reports GAO issued in 2020 and 2018. GAO found in 2020 that in overseeing coal operator self-insurance DOL did not (1) estimate future benefit liability when setting the amount of collateral required to self-insure, (2) regularly review operators to assess whether the required amount of collateral should change, or (3) always take action to protect the Trust Fund by revoking an operator's ability to self-insure as appropriate.

GAO testified on these findings and its related priority recommendations before the Subcommittee on Workforce Protections, Committee on Education and Workforce, House of Representatives, in December 2021. Since that time, GAO has contacted DOL periodically to obtain updates on actions taken to implement GAO's recommendations. In February 2023, GAO also contacted DOL about the October 2022 coal tax rate increase and how it may affect Trust Fund finances.

### What GAO Recommends

DOL agreed with the recommendations made in GAO's 2020 report that DOL should establish procedures for self-insurance renewals and coal operator appeals. Both of these priority recommendations remain open.

View [GAO-24-107597](#). For more information, contact Cindy Brown Barnes

May 22, 2024

## BLACK LUNG BENEFITS PROGRAM

### Lack of Resolution on Coal Operator Self-Insurance Increases Financial Risk to Trust Fund

#### What GAO Found

The Department of Labor (DOL) took initial steps to implement GAO's 2020 recommendations to improve its oversight of self-insured coal mine operators, but its reform effort was hindered by the COVID-19 pandemic, according to DOL officials. Additionally, the incoming administration undertook a review of DOL's coal operator self-insurance program, according to DOL officials. Black lung benefits are generally paid by liable coal mine operators, and federal law generally requires coal mine operators to secure their black lung benefit liability. Operators are allowed to self-insure if they meet certain DOL conditions. The federal government's Black Lung Disability Trust Fund (Trust Fund) pays benefits when no responsible mine operator can be identified, or the liable mine operator does not pay. This can happen, for example, when an operator goes bankrupt.

As GAO reported in 2020, the bankruptcies of some self-insured operators that occurred from 2014 through 2016 led to the transfer of \$865 million in estimated benefit responsibility to the Trust Fund, according to DOL. This occurs when the amount of collateral DOL requires from a self-insured coal operator does not fully cover the operator's benefit responsibility should the operator become insolvent. Since 2016, several other self-insured operators have also filed for bankruptcy, according to DOL.

In December 2020, DOL issued a preliminary bulletin for coal operator self-insurance that described significant changes and included actions that would have addressed GAO's recommendations. For instance, DOL set a goal to resolve coal operator appeals within 90 days after receiving supporting documents or meeting with the operator to discuss their concerns. However, in February 2021, DOL rescinded the preliminary bulletin while the incoming administration reviewed DOL's coal mine operator self-insurance program, according to DOL officials. Officials said that this review was completed in November 2021.

In January 2023, DOL published a Notice of Proposed Rulemaking in the Federal Register that proposed changes to its process for coal mine operators to self-insure. For example, the proposed rule would require that all self-insured operators obtain collateral equal to 120 percent of their estimated black lung benefit liabilities. Additionally, the proposed rule would make changes to the coal mine operator self-insurance application, renewal, and appeals process. For instance, the proposed rule would require DOL to notify the self-insurance applicant of the date its authorization is effective, the date its authorization will expire, and the date the applicant must apply to renew its authorization if it intends to continue self-insuring. The proposed rule would also require that operators that wish to appeal a DOL determination must do so within 30 days of receiving that determination and to provide any supporting documentation within that period. In May 2024, DOL submitted its final draft rule on coal operator self-insurance to the Office of Management and Budget for review.

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Chairman Hickenlooper, Ranking Member Braun, and Members of the Subcommittee:

Thank you for the opportunity to highlight GAO's prior work that describes the financial challenges facing the Black Lung Disability Trust Fund (Trust Fund). I will describe how the Department of Labor's (DOL) limited oversight of coal mine operator self-insurance has affected the Trust Fund.<sup>1</sup> I will also provide an update on actions DOL has taken to implement our recommendations to improve oversight of coal operator self-insurance, including its recent Notice of Proposed Rulemaking published in the Federal Register in January 2023.<sup>2</sup> We made two recommendations to improve oversight of coal mine operator self-insurance. Given the continued financial risk self-insured coal mine operators pose to the Trust Fund, we believe both of these open recommendations warrant priority attention from DOL.<sup>3</sup>

The Black Lung Benefits Program provides medical and cash assistance to certain coal miners who are totally disabled due to pneumoconiosis, also known as black lung disease.<sup>4</sup> About 23,300 total beneficiaries (primary and dependents) were receiving black lung benefits during fiscal year 2023.<sup>5</sup> The number of beneficiaries has decreased over time because of declining coal mining employment and an aging beneficiary population, according to DOL officials. However, black lung beneficiaries could increase in the near term due to the increased occurrence of black lung disease in its most severe form, progressive massive fibrosis,

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<sup>1</sup>GAO, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, [GAO-18-351](#) (Washington, D.C.: May 30, 2018).

<sup>2</sup>GAO, *Black Lung Benefits Program: Improved Oversight of Coal Mine Operator Insurance Is Needed*, [GAO-20-21](#) (Washington, D.C.: Feb. 21, 2020); *Black Lung Benefits Act: Authorization of Self-Insurers*, 88 Fed. Reg. 3349 (Jan. 19, 2023).

<sup>3</sup>GAO, *Priority Open Recommendations: Department of Labor*, [GAO-23-106464](#) (Washington, D.C.: May 9, 2023).

<sup>4</sup>A miner's surviving dependents can also receive compensation. Black lung is caused by breathing coal mine dust, and the severity of the disease can range from mild—with no noticeable effects on breathing—to advanced disease, which could lead to respiratory failure and death, according to the Department of Health and Human Service's Centers for Disease Control, National Institute for Occupational Safety and Health.

<sup>5</sup>This number excludes black lung beneficiaries whose claims were filed on or before December 31, 1973, as these awards are generally funded from Treasury's general fund, and not the Trust Fund. It also excludes beneficiaries that only receive medical benefits.

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particularly among Appalachian coal miners, according to National Institute for Occupational Safety and Health (NIOSH) officials.<sup>6</sup>

Black lung benefits are generally to be paid by liable coal mine operators. However, the federal government's Trust Fund pays benefits in certain circumstances, including in cases where no responsible mine operator can be identified or when the liable mine operator did not pay.

This hearing statement is based on our prior work.<sup>7</sup> In producing our February 2020 report, we identified coal operators that filed for bankruptcy from 2014 through 2016 using Bloomberg data. We selected these years, in part, because the bankruptcies were more likely to be resolved so that their effects on the Trust Fund could be assessed. We also analyzed data and documentation on commercially-insured and self-insured coal operators, and examined workers' compensation insurance practices in four of the nation's top five coal producing states. In addition, we interviewed DOL officials, coal mine operators, and insurance company representatives, among others.

In November 2021, we interviewed DOL officials to obtain information on actions taken to implement the self-insurance related recommendations we made in February 2020 and we also reviewed agency documentation. We have contacted DOL officials periodically since February 2020 to obtain further updates on these recommendations. We also reviewed DOL's Notice of Proposed Rulemaking for coal mine operator self-insurance published in the Federal Register in January 2023. Additionally, in February 2023, we contacted DOL about the change in the coal tax rate that was implemented in October 2022 to understand how it may affect Trust Fund finances.

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<sup>6</sup>NIOSH studies found increases in the prevalence of black lung disease among long-tenured Appalachian coal miners and have documented hundreds of miners with the most severe form of the disease, progressive massive fibrosis, receiving care at two clinics in Kentucky and Virginia. See D.J. Blackley, L.E. Reynolds, C. Short, R. Carson, E. Storey, C.N. Halldin, and A.S. Laney, "Progressive Massive Fibrosis in Coal Miners From 3 Clinics in Virginia," *Journal of the American Medical Association*, 319(5):500–501 (February 6, 2018); and D.J. Blackley, J.B. Crum, C.N. Halldin, E. Storey, and A.S. Laney, "Resurgence of Progressive Massive Fibrosis in Coal Miners — Eastern Kentucky 2016," *Morbidity and Mortality Weekly Report*, 65:1385–1389 (December 16, 2016).

<sup>7</sup>GAO, *Black Lung Benefits Program: Continued Inaction on Coal Mine Operator Self-Increases Financial Risk to Trust Fund*, GAO-22-105546 (Washington D.C.: Dec. 2, 2021); GAO-20-21; and GAO-18-351.

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The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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### The Black Lung Disability Trust Fund Faces Financial Challenges

In May 2018, we reported that the Trust Fund faces financial challenges, which remains the case today.<sup>8</sup> The Trust Fund's expenditures have consistently exceeded revenue and it has essentially borrowed with interest from the Department of the Treasury's general fund almost every year since 1979, which was its first complete fiscal year.<sup>9</sup> In fiscal year 2023, the Trust Fund borrowed about \$2.7 billion from Treasury's general fund to cover its expenditures, which includes debt and interest repayments, according to DOL.

Trust Fund revenue is primarily obtained through a tax on coal produced and sold domestically, which we refer to in this statement as the coal tax.<sup>10</sup> The coal tax rate has varied over the years. From 1986 through 2018, the coal tax rate was \$1.10 per ton of underground-mined coal and \$0.55 per ton of surface-mined coal, up to 4.4 percent of the sales price. In 2019, the rate of the coal tax decreased to \$0.50 cents and \$0.25 cents per ton of underground-mined and surface-mined coal, respectively, up to 2 percent of the sales price. In 2020 through 2021, the rate of the coal tax increased to pre-2019 levels but decreased again beginning in January 2022. Effective October 1, 2022, the Inflation Reduction Act of 2022 set the coal tax to the higher rate.<sup>11</sup> However, even with the higher coal tax rate, DOL officials estimated that the Trust Fund's outstanding debt will still exceed \$13 billion by 2050.

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<sup>8</sup>GAO-18-351.

<sup>9</sup>Under federal law, when necessary for the Trust Fund to make relevant expenditures, funds are appropriated to the Trust Fund as "repayable advances," and then those advances must be repaid with interest to the general fund of the U.S. Treasury. 26 U.S.C. § 9501(c). For reporting purposes, we refer to this process as "borrowing" from Treasury's general fund, which is distinct from the borrowing authority provided by law to some agencies. According to the Treasury, the general fund includes assets and liabilities used to finance the daily and long-term operations of the U.S. government as a whole.

<sup>10</sup>The coal tax is imposed on the sale of all domestically produced coal with two exceptions: (1) lignite coal and (2) exported coal.

<sup>11</sup>Pub. L. No. 117-169, § 13901, 136 Stat. 1818, 2013.

To pay benefits to coal miners disabled by black lung, federal law generally requires coal mine operators to secure their black lung benefit liability. Operators may purchase coverage from commercial insurance companies or may self-insure. A self-insured coal mine operator assumes the financial responsibility for providing black lung benefits to its eligible employees by paying claims as they are incurred. Operators are permitted to self-insure if they meet certain DOL conditions. For instance, operators applying to self-insure must secure collateral in the form of an indemnity bond, deposit or trust, or letter of credit in an amount deemed necessary and sufficient by DOL to secure their liability.<sup>12</sup>

Coal operator bankruptcies have further strained Trust Fund finances. We reported in February 2020 that the bankruptcies of some self-insured operators that occurred from 2014 through 2016 led to the transfer of \$865 million in estimated benefit responsibility to the Trust Fund, according to DOL (see table 1).<sup>13</sup> This may occur when the amount of collateral DOL requires from a self-insured coal operator does not fully cover the operator's benefit responsibility should the operator become insolvent. For example, the collateral DOL required from Alpha Natural Resources was about \$12 million and approximately \$494 million of estimated benefit liability was transferred to the Trust Fund, according to DOL.

**Table 1: Self-Insured Coal Mine Operator Bankruptcies That Affected the Black Lung Disability Trust Fund, Filed from 2014 through 2016**

Coal operator	Amount of collateral at time of bankruptcy	Estimated benefit liability transferred to the Trust Fund	Estimated number of beneficiaries for whom liability has been transferred to the Trust Fund <sup>a</sup>
Alpha Natural Resources	\$12 million	\$494 million	1,839
James River Coal Company	\$0.4 million	\$141 million	490
Patriot Coal	\$15 million	\$230 million	993
<b>Total</b>	<b>\$27.4 million</b>	<b>\$865 million</b>	<b>3,322</b>

Source: GAO presentation of Department of Labor data. | GAO-24-107597

<sup>a</sup>These totals include claims in active pay status as of September 2019, and estimates of newly awarded claims in fiscal year 2020 and into the future, according to the Department of Labor.

<sup>12</sup>A letter of credit may only be used in conjunction with another acceptable form of collateral.

<sup>13</sup>GAO-20-21.

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**Limited DOL  
Oversight Increases  
Financial Risk to  
Trust Fund**

Since 2016, several other self-insured operators have also filed for bankruptcy, according to DOL. For instance, the bankruptcies of Westmoreland Coal and Murray Energy, which occurred in October 2018 and October 2019, respectively, will lead to the transfer of about \$61.1 million in additional estimated benefit responsibility to the Trust Fund, according to DOL officials.

In February 2020, we reported that DOL's limited oversight of coal mine operator insurance exposed the Trust Fund to additional financial risk.<sup>14</sup> Specifically, we found that DOL did not (1) estimate future benefit liability when setting the amount of collateral required to self-insure, (2) regularly review operators to assess whether the required amount of collateral should change, or (3) always take action to protect the Trust Fund by revoking an operator's ability to self-insure as appropriate.

DOL began implementing a new self-insurance process in July 2019. However, we found that the new process lacked procedures for its planned annual renewal of self-insured operators and for resolving coal operator appeals should operators dispute DOL collateral requirements.<sup>15</sup> We noted that this could hinder DOL from revoking operators' ability to self-insure should they not comply with DOL requirements. To strengthen its oversight of self-insured operators, we recommended, among other things, that DOL:

- develop and implement procedures for coal mine operator self-insurance renewal that clarifies how long an operator is authorized to self-insure, when an operator must submit its renewal application and supporting documentation, and the conditions under which an operator's self-insurance authority would not be renewed, and
- develop and implement procedures for self-insured coal mine operator appeals that identify timelines for self-insured operators to submit documentation supporting their appeals and that identify a goal for how much time DOL should take to make appeals decisions.

Both of these priority recommendations remain open.

We stated that establishing clear self-insurance renewal procedures could better position DOL to take action to protect the Trust Fund should an operator not submit its renewal application and supporting documentation

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<sup>14</sup>GAO-20-21.

<sup>15</sup>GAO-20-21.

or comply with DOL's collateral requirements. In addition, procedures that identify timelines for self-insured operators to submit documentation supporting their appeals, and that identify a goal for how much time DOL should take to make appeals decisions, could help to ensure that DOL is able to revoke an operator's ability to self-insure, when warranted.

**DOL Has Taken Steps to Implement GAO's Recommendations, but Lack of Resolution Increases Financial Risk to Trust Fund**

In February 2020, DOL sent letters to 14 self-insured operators asking them to provide about \$251 million in total collateral.<sup>16</sup> Half of the coal operators provided DOL's requested collateral, and the remaining half appealed, according to DOL. DOL officials said that five operators appealed based on the amount of collateral DOL requested and the other two operators appealed based on DOL's finding that the operators no longer met DOL requirements to self-insure. As a result, DOL had not secured about \$186 million in requested collateral from the five self-insured operators that appealed DOL's requested collateral. Table 2 shows the status of the 14 self-insured coal operators as of November 2021 including the amount of collateral DOL requested and secured (if applicable) and operators' estimated benefit liabilities.

**Table 2: Self-Insured Coal Mine Operators as of November 2021**

Coal mine operator	Amount of collateral DOL requested in February 2020, if applicable	Amount of collateral secured by operator as of November 2021	Most recent actuarial estimate of black lung benefit liabilities
<i>Coal mine operators that provided DOL's requested collateral</i>			
Coal mine operator #1	\$16,754,500	\$17,197,698	\$23,935,000
Coal mine operator #2	\$3,296,856	\$3,301,390	\$3,296,856
Coal mine operator #3	\$1,364,354	\$1,364,354	\$1,364,354
Coal mine operator #4	\$1,132,719	\$1,132,719	\$1,132,611
Coal mine operator #5	\$1,045,502	\$1,045,502	\$1,230,002
Coal mine operator #6	\$634,100	\$634,100	\$746,000
Coal mine operator #7	\$1,610,511 (later corrected by DOL to \$557,793)	\$557,793	\$656,227
<i>Coal mine operators that appealed</i>			
Coal mine operator #8	\$78,062,566	\$6,900,000	\$111,517,952
Coal mine operator #9	\$65,678,185	\$2,500,000	\$93,825,978
Coal mine operator #10	\$40,411,000	\$8,400,000	\$57,730,000
Coal mine operator #11	\$39,761,129	\$21,000,000	\$58,801,613

<sup>16</sup>GAO, *Black Lung Benefits Program: Oversight Is Needed to Address Trust Fund Solvency Strained by Bankruptcies*, GAO-20-438T (Washington, D.C.: Feb. 26, 2020).

Coal mine operator	Amount of collateral DOL requested in February 2020, if applicable	Amount of collateral secured by operator as of November 2021	Most recent actuarial estimate of black lung benefit liabilities
Coal mine operator #12	\$2,079,057	\$1,000,000	\$2,079,057
Coal mine operator #13	Not applicable. No longer met DOL requirements to self-insure and told to obtain commercial coverage	\$24,797,512	\$21,969,863
Coal mine operator #14	Not applicable. No longer met DOL requirements to self-insure and told to obtain commercial coverage	\$400,000	\$20,222

Source: GAO presentation of Department of Labor data. | GAO-24-107597

Note: The self-insured arrangements can include those that cover legacy federal black lung liabilities (e.g., formerly employed miners only). This may arise when an operator no longer actively mines coal or is using commercial insurance for its current mining operations and self-insurance for its past operations. Self-insured operators and their subsidiaries may use a combination of self-insurance and commercial insurance to cover their liabilities, according to the Department of Labor. Numbers rounded to nearest dollar.

In addition to the 14 operators DOL contacted in February 2020 there were three additional self-insured operators, according to DOL.<sup>17</sup> DOL officials said two of these operators provided actuarial estimates they could not use to assess how much collateral they should require. DOL officials said they did not need to reassess the collateral required for the remaining operator because they had done so in 2019. DOL's 2019 review estimated that the operator's black lung liability was about \$163 million and its required collateral was just over \$24 million, which the operator secured.

DOL officials said their ability to resolve appeals was hindered by the COVID-19 pandemic as they and coal operator staff adjusted to different working conditions and experienced challenges in obtaining and processing needed documentation.

In December 2020, DOL issued a preliminary bulletin and sought public comment on updated guidelines for coal operator self-insurance.<sup>18</sup> This bulletin was the culmination of DOL's approximately 5-year effort to

<sup>17</sup>As of November 2021, a total of 17 coal operators were self-insured according to DOL officials.

<sup>18</sup>Department of Labor, Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation BLBA Bulletin No. 21-01, *DCMWC Self-Insurance Process Guidelines* (Washington, D.C., Dec. 7, 2020).

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reform the self-insurance program.<sup>19</sup> The guidelines included actions that would have addressed our recommendations. For instance, DOL specified that it would authorize operators to self-insure for a period of one year (after which an operator would be required to submit a self-insurance renewal application), and it set a goal to resolve coal operator appeals within 90 days after receiving supporting documents or meeting with the operator to discuss their concerns. Additionally, DOL stated that it would set collateral requirements based on an operator's actuarial estimated benefit liabilities and risk of insolvency, and reassess the collateral requirements quarterly based on review of an operator's financial statements.

In February 2021, DOL rescinded the preliminary bulletin when the incoming administration undertook a review of DOL's coal mine operator self-insurance program, according to DOL officials.<sup>20</sup> These officials said that the review was completed in November 2021.

In January 2023, DOL published a Notice of Proposed Rulemaking in the Federal Register that proposed changes to its process for coal mine operators to self-insure.<sup>21</sup> For example, the proposed rule would:

- require that all self-insured operators obtain collateral equal to 120 percent of their estimated black lung benefit liabilities;
- require DOL to notify the self-insurance applicant of the date its authorization is effective, the date its authorization will expire, and the date the applicant must apply to renew its authorization if it intends to continue self-insuring; and
- require that operators that wish to appeal a DOL determination must do so within 30 days of receiving that determination and to provide any supporting documentation within that period.

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<sup>19</sup>DOL officials said that beginning in summer 2015 they stopped permitting any new coal mine operators to self-insure as the agency worked with auditors, economists, and actuaries to develop new procedures for self-insurance.

<sup>20</sup>DOL issued a public notice withdrawing its request for comments on its preliminary bulletin. *Black Lung Benefits Act Self-Insurance: Withdrawal of Guidance*, 86 Fed. Reg. 8806 (Feb. 9, 2021).

<sup>21</sup>*Black Lung Benefits Act: Authorization of Self-Insurers*, 88 Fed. Reg. 3349 (Jan. 19, 2023).

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In May 2024, DOL submitted its final draft rule on coal operator self-insurance to the Office of Management and Budget for review.

Chairman Hickenlooper, Ranking Member Braun, and Members of the Subcommittee, this concludes my prepared statement. I would be happy to respond to any questions you may have at this time.

If you or your staffs have any questions concerning this testimony, please contact me at (202) 512-7215 or [braun@senate.gov](mailto:braun@senate.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Thomas Costa (Director), Blake Ainsworth (Assistant Director), Justin Durkin (Analyst in Charge), and Lauren Shamen. Also contributing to this testimony were Caitlin Cusati, Alex Galuten, Monika Gomez, and Kate van Gelder.

GAO-24-10787

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Senator HICKENLOOPER. Thank you.  
Dr. Harris.

**STATEMENT OF DREW HARRIS, M.D., ASSOCIATE PROFESSOR OF MEDICINE, UNIVERSITY OF VIRGINIA AND MEDICAL DIRECTOR, STONE MOUNTAIN BLACK LUNG PROGRAM, ST. CHARLES AND VANSANT, VA**

Dr. HARRIS. Chairman Hickenlooper, Ranking Member Braun, Senator Casey, and Senator Kaine, I appreciate the opportunity to talk today, and I am going to start off by sharing the story of one of my patients. And Paul is 62. He is a father and a grandfather, and in his 20's, he worked for 8 years underground in a coal mine in Eastern Kentucky.

He worked until a roof collapsed and crushed him, and he was no longer able to work, and he became a church pastor. And about 10 years ago, he started to develop shortness of breath. And he was evaluated, diagnosed with black lung with an X-ray and pulmonary function tests at my clinic.

About 5 years ago, the symptoms progressed, and he felt difficulty occasionally even finishing his church sermons. And he applied three times for black lung benefits, but was denied benefits each time, despite imaging and a lung biopsy showing that his lungs were full of coal and rock dust.

Paul's story is similar to countless other miners that I care for and illustrate three main points that I want to illustrate today.

The first is that rates of severe black lung are at near historical highs in central Appalachia. The second point is that we should be using additional existing tools to improve the early detection and diagnosis of black lung.

The third is that the black lung benefits process is frustrating for nearly all coal miners, and the Black Lung Benefits Improvement Act would be a big step in the right direction. So first, Paul is not alone and is in fact part of a much larger problem.

Earlier this year, my colleagues and I published in JAMA, the Journal of the American Medical Association, a publication describing over a thousand coal miners who in the last 5 years were diagnosed with progressive massive fibrosis, which is the most severe form of black lung.

We are seeing a huge resurgence of severe black lung, which is an entirely preventable disease. And like Paul, many of these miners were young when they got diagnosed and they only worked a short tenure in the mines.

My second point is that better early detection of black lung is possible and key to preventing severe disease, and I have two suggestions for improving black lung diagnosis and detection. The first is we should be screening all miners with a special breathing test called diffusing capacity.

This is cheap, widely available, and measures how well the lungs perform, and an impaired diffusing capacity can be an early warning signal for black lung. The second is that we should be utilizing CT scans for especially high risk miners to diagnose disease. We know that CT scans are more sensitive than X-rays for early detection.

Perhaps Paul's disease would have been diagnosed earlier if he were offered a CT scan or a diffusion test during his coal mining career. And if so, perhaps he could have requested a transfer to a less dusty position and may not be struggling to breathe today.

My last point is that the black lung benefits system, as currently designed, now does not work for miners like Paul and a fix is needed now. Coal miners with severe black lung fight for more than their breath, they fight for their livelihood.

The Federal Black Lung Benefits Program provides health insurance and a small monthly stipend to the minority of miners that prove they are sick enough to meet a disability standard, and this is almost always a long and difficult process. Paul didn't qualify for benefits until I published his story in a medical journal, which was submitted along with this fourth application.

It shouldn't have taken Paul 6 years, three rejected claims, a lung biopsy, and a publication in the Lancet to get Paul qualified, or many other miners like Paul that should be qualified. And my patients who eventually do receive benefits are receiving a small stipend that is not even indexed to inflation.

The Black Lung Benefits Improvement Act would improve this process in several ways. Importantly, it would improve accuracy in diagnosis of progressive massive fibrosis by incorporating the better imaging that we get from a CT scan in miners that have abnormal X-rays.

This Act would also increase benefits by indexing the benefits to inflation. But as you all know, a version of this Act has been proposed for nearly a decade and has not yet passed. And while it is too late for Paul to benefit from these proposed changes, many in his church congregation and his community could still be helped by these changes.

Nationally, there are many thousands of miners with devastating black lung that desperately need this help. Thank you for taking this black lung crisis seriously by having me here to speak with you today, and I hope that you will consider the improved early detection of black lung methods that we talked about, and not delay the passage of the Black Lung Benefits Improvement Act.

[The prepared statement of Dr. Harris follows.]

PREPARED STATEMENT OF DREW HARRIS

Chairman Hickenlooper, Ranking Member Braun, and Members of the Subcommittee, thank you for the opportunity to testify today. The opinions expressed in this testimony are solely my own and do not necessarily reflect those of the University of Virginia or Stone Mountain Health Services.

I am a pulmonologist and the medical director of the Black Lung Program at Stone Mountain, a federally Qualified Health Center in Southwest Virginia. Stone Mountain is the largest black lung clinic in the Nation—we see about 2,000 coal miners each year. Most of these miners are no longer working.

I'd like to start off by sharing the story of one of my patients. Paul is a charming 62-year-old family man who just this week welcomed to the world his 6th grandkid. Paul worked for 8 years underground as a roof bolter in eastern Kentucky before a mine caved in and crushed him. No longer able to work underground, Paul now pastors a church. For years, he has struggled to keep up with his grandkids, and sometimes has difficulty finishing his sermons due to his trouble breathing. Despite his severe lung disease with lung biopsies indisputably showing silica and coal dust, he was denied benefits 3 times before I met him.

Paul's story is similar to countless other miners and illustrates 3 main points I want to get across today:

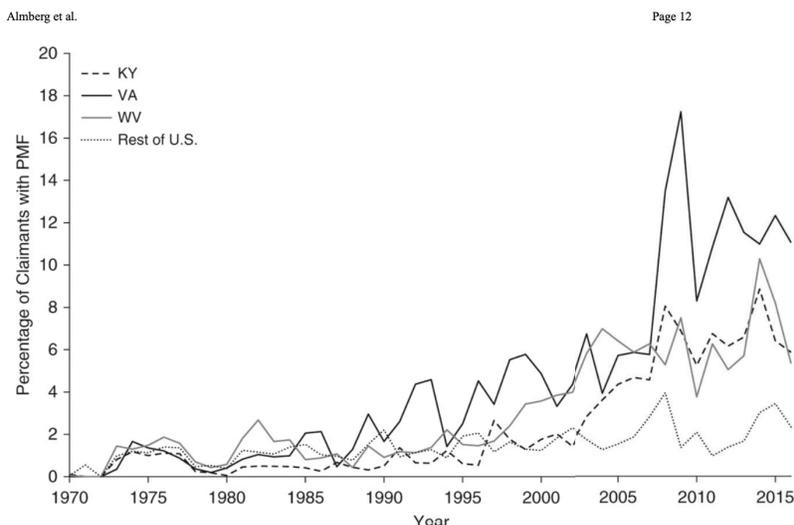
- (1) **The rates of severe black lung are at near-historical highs in Central Appalachia.**
- (2) **We should start using additional, existing tools to improve early detection of disease.**
- (3) **The black lung benefits process is frustrating for nearly all coal miners. The 2023 Black Lung Benefits Improvement Act would be a big step in the right direction.**

**First: Paul is not alone, and is in fact part of a larger problem.** Earlier this year, my colleagues and I published a report in JAMA, the Journal of the American Medical Association describing over 1,000 miners who, in the last 5 years, were *newly* diagnosed with the most severe form of black lung: progressive massive fibrosis (PMF). Like Paul, many of these miners are young and worked short tenures in mining.<sup>1</sup> A previous large study of former U.S. miners applying for Federal Black Lung Program benefits shows that the proportion of miners with PMF has significantly increased since the 1990's with the highest rates of disease seen in Central Appalachia.<sup>2</sup> The figure below from this study (Almberg ET al.) shows the percentage of claimants with PMF in Virginia has rapidly increased in the last 2 decades to a rate greater than 10 percent. This bears repeating: in Virginia more than 1 out of 10 miners applying for Federal black lung benefits have the most advanced stage of black lung. Even in actively working miners, rates of black lung including PMF are still unacceptably high. In a study of miners participating in the Coal Worker's Health Surveillance Program from 2014–2022, 331 (8.5 percent) of miners from Cen-

<sup>1</sup> Harris DA, Almberg KA, Blackley DJ ET al. JAMA 2024 331 (5). <https://pubmed.ncbi.nlm.nih.gov/38175652/>.

<sup>2</sup> Almberg KA, Halldin CN, Blackley DJ ET al. Ann ATS 2018 December; 15 (12). <https://pubmed.ncbi.nlm.nih.gov/30114941/>.

tral Appalachia had evidence of black lung—with 52 (1.3 percent) showing evidence of progressive massive fibrosis.<sup>3</sup>



**Figure 3.** Percentage of claimants for Federal Black Lung Program benefits who received a determination of progressive massive fibrosis (PMF) during their claim process in the central Appalachian states of Kentucky, Virginia, and West Virginia compared with the rest of the United States, 1970–2016. Data restricted to those miners with between 5 and 60 years of coal mine employment. Data source: U.S. Department of Labor, Office of Workers’ Compensation Programs, Division of Coal Mine Workers’ Compensation.

**My second point: Better early detection of black lung is possible and is key to preventing severe disease.** Voluntary participation in respiratory health screening for coal miners, as part of the NIOSH Coal Worker’s Health Surveillance Program (CWHSP), is not working as it is intended. Only about 1 in 3 working miners participate in this voluntary program. But even more concerning, the participation rates are lowest in Central Appalachia—where the black lung disease rates and severity are the highest. Hall ET al. noted that while Central Appalachia accounted for 40 percent–45 percent of U.S. coal mining employment annually from 2014 to 2021, only 21.9 percent of CWHSP participants worked in Central Appalachia.

This lack of participation in the CWHSP has significant health consequences. 39 percent of miners with disabling pneumoconiosis did not participate in the CWHSP during their working careers.<sup>4</sup> Earlier disease detection might have allowed many of these miners to reduce their subsequent dust exposures and prevent the development of severe disease.

There are many barriers to participation in the CWHSP including stigma, fear and financial disincentives (such job loss and inability to find additional employment). These barriers are challenging to address, especially as studies of miners have highlighted that for many miners, providing for their family is paramount, even at the cost of their own health.<sup>5</sup>

To stop this crisis of black lung that is ongoing in the U.S., we need to work to both improve participation in the CWHSP and to improve screening tools used in

<sup>3</sup> Hall NB, Reynolds L, Blackley ET al. JOEM 2024 66 (2). <https://pubmed.ncbi.nlm.nih.gov/37907411/>.

<sup>4</sup> Almberg KS, Cohen RA, Blackley DJ, ET al. Linking compensation and health surveillance data sets to improve knowledge of U.S. coal miners’ health. *J Occup Environ Med* 2017;59:930–934. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5710793/>.

<sup>5</sup> Reynolds LE, Blackley DJ, Colinet JF, ET al. Work practices and respiratory health status of Appalachian coal miners with progressive massive fibrosis. *J Occup Environ Med* 2018;60:e575–e581. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6607434/>.

the CWHSP to better identify early disease in working miners. I have three suggestions in this regard:

(1) Reduce the financial disincentive to participate in the CHWSP. Working miners can apply for Federal black lung benefits even while they are working. If they are found to have severe enough disease to meet the disability criteria and are awarded benefits, they can immediately start receiving part of their benefit, even while continuing to work in the mines: a health insurance benefit. However, working miners cannot receive another critical component of this benefit: a monthly stipend associated with the black lung benefits program until *after they stop working*. This represents a departure from the original congressional intent under the Black Lung Benefits Act, which long allowed miners with PMF to draw full medical and monetary benefits. If the Department of Labor would once again allow miners to draw the monetary benefit during their working years, it is likely that many miners would seek earlier health screening.

(2) We should be screening all miners with a breathing test called “diffusion capacity.” Diffusion capacity is cheap, widely available and measures how well the lungs perform. An impaired diffusing capacity can be an early warning signal for black lung.<sup>6, 7</sup>

(3) We should utilize CT scans for screening *especially high-risk miners*, like Paul. We know that the rates of rapidly progressive and severe disease are highest in certain geographic regions. One study of CWHSP-participating miners, in which 84 percent worked in Central Appalachia, highlights how rapidly severe black lung can develop in high-risk miners: 17 percent of miners progressed from a normal chest X-ray to PMF (the most severe type of black lung) in less than 10 years.<sup>8</sup> These miners are at increased risk for rapidly progressive disease largely because of where they work—central Appalachia, where exposure to toxic silica dust in thin seam mines is known to be the highest.

We also know that specific job types in coal mines also leads to increased risk of PMF due to increased silica dust exposures. Miners working at the mine face, in jobs like roof bolting or operating a continuous miner, face an increased risk of severe disease.<sup>9</sup>

We know who is at the highest risk for rapidly progressive and severe black lung disease. If we are truly committed to ending the countless preventable deaths that are devastating the coalfield communities in America, then we need to utilize the most sensitive tools to identify early disease in the highest risk miners.

CT scans are more sensitive test than X-rays for early detection of disease in both silica<sup>10</sup> and coal mine dust<sup>11</sup> exposed workers. When coal miners are screened by X-rays, early diagnoses of occupational lung disease will be missed.

There are challenges in utilizing CT scans at a population level for surveillance in occupational lung disease. In the U.S., there is a formal certification program (e.g. NIOSH B-reader)<sup>12</sup> and classification system (e.g. The International Labor Organization ILO classification of radiographs)<sup>13</sup> to categorize abnormalities on chest X-rays. Similar programs do not yet exist in the U.S. for CT scans. But the key word here is: yet. Outside of the U.S., surveillance and screening programs in other countries are beginning to pivot toward utilizing CT scans in this context.<sup>14</sup> We should be leading the

<sup>6</sup> Carta P, Aru G, Barbieri MT, ET al. *Occupational and environmental medicine*. 1996;53(5):312–319. <https://pubmed.ncbi.nlm.nih.gov/8673178/>.

<sup>7</sup> Wang X, Yu IT, Wong TW, ET al. *Am J Ind Med*. 1999;35(2):124–131. <https://pubmed.ncbi.nlm.nih.gov/9894535/>.

<sup>8</sup> Laney AS, Blackley DJ, Halldin C. *OEM* 2017 Jul 74 (7). <https://pubmed.ncbi.nlm.nih.gov/28408654/>.

<sup>9</sup> Zell-Baran L, Go LHT, Sarver E ET al. *J OEM* 2023 65 (4). <https://pubmed.ncbi.nlm.nih.gov/36730599/>.

<sup>10</sup> Hoy RF, Dimitriadis C, Abramson M ET al. *OEM*. 2023 80 (8). <https://oem.bmj.com/content/80/8/439>.

<sup>11</sup> Savranlar A, Altin R, Mahmutyazicioglu ET al. *Eur J Radiology* 2004 51 (2). <https://pubmed.ncbi.nlm.nih.gov/15246524/>.

<sup>12</sup> The ILO Classification System: <https://www.ilo.org/resource/ilo-international-classification-radiographs-pneumoconioses-1>.

<sup>13</sup> CDC/NIOSH's B-reader Program: <https://www.cdc.gov/niosh/docs/2019-111/default.html>.

<sup>14</sup> Tamura T, Sugauma N, Hering KG ET al. *Ind Health* 2015 53 (3). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4463184/>.

world in innovative solutions in occupational health disease prevention and early detection, not following in the footsteps of other countries while American coal miners are suffering.

Perhaps Paul's disease would have been recognized earlier if he had been offered a CT scan or a diffusion test during his coal mining career. If so, he could have requested a job transfer to a less dusty position and may not be struggling to breathe today.

**My last point: The black lung benefit system, as currently designed does not work for miners like Paul and a fix is needed now.** Coal miners with severe black lung fight for more than their breath. They fight for their livelihood. The Federal black lung benefits program provides health insurance and a small monthly stipend to the minority of miners who can prove they are sick enough to meet a disability standard. This is almost always a long and difficult process.

Paul didn't qualify for benefits until a he had a CT scan, a lung biopsy and his story published in a medical journal.<sup>15</sup> His published story, including images of his lung masses and lung biopsy (image below) showing lungs full of coal and rock dust, was submitted along with his 4th, finally successful application. It shouldn't take 6 years and a publication in the Lancet to get Paul, or many other miners like Paul, awarded benefits.

The 2023 Black Lung Benefits Improvement Act would improve this process in several ways. One key mechanism is by improved accuracy in diagnosing progressive massive fibrosis by strategically incorporating the better imaging obtained by CT scans in miners with specific abnormalities seen on their X-rays. CT scans are more accurate at identifying PMF than X-rays, and for miners with known black lung on X-rays, we should be utilizing the better test (CT scans) to confirm whether or not PMF is present.

However, as you know, a version of Black Lung Benefits Improvement Act has been proposed for nearly a decade. While we wait, my patients who do receive benefits are receiving a small stipend that is not indexed to inflation. And those who are sick-but-not-yet-qualified are often frustrated by conflicting X-ray results that leads to years-long disputes.

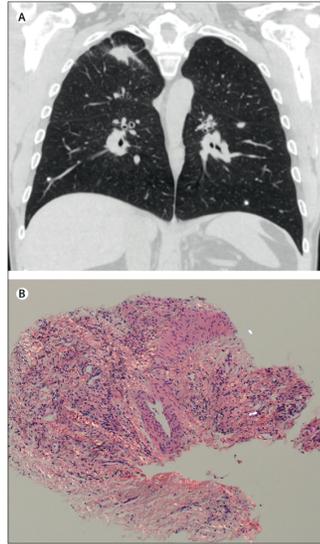
While it is too late for Paul to benefit from these proposed changes, many in his church congregation and his community could still be helped by these changes, and nationally there are thousands of miners that desperately need this help. Thank you for taking this black lung crisis seriously by having me here to speak with you today. I hope that you will consider ways to improve early detection of black lung and no longer delay the passing of the Black Lung Benefits Improvement Act.

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<sup>15</sup> Harris DA, Willis JA, Tomann. The Lancet 2020, 395(10234). <https://pubmed.ncbi.nlm.nih.gov/32359461/>.

Image of Paul's Lung Masses and Biopsy showing coal and silica dust:

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See Online for appendix

**Figure: Coal workers' pneumoconiosis**  
 (A) CT scan of the chest shows numerous bilateral pulmonary nodules and an irregular 5.2 cm mass in the right upper lobe with mediastinal lymphadenopathy.  
 (B) Histopathological examination of the mass shows focal collagenous fibrosis associated with anthracosis and polarised silicate particles—variably sized white crystals. Original magnification less than  $\times 50$ .

Senator HICKENLOOPER. Thank you, Dr. Harris.  
 Mr. Roberts.

**STATEMENT OF CECIL E. ROBERTS, PRESIDENT, UNITED MINE WORKERS OF AMERICA, TRIANGLE, VA**

Mr. ROBERTS. Thank you very much. I hit talk—there it goes. Thank you very much, Chairman Hickenlooper, and Ranking Member Braun, and my friends, Senator Casey and Kaine. I have worked for many years—with these two for many years to make miners' live better, whether it is defending their pensions and their health care, making the mines safer, and most recently, this issue of black lung.

I am a coal miner. My father was a coal miner. My grandfathers were coal miners. My great grandfathers were coal miners. Unfortunately, I never met either one of my grandfathers. Both of them were killed in the coal mines before I was born, and I had to depend on stories about their lives to get to know them and appreciate what they did when they were alive. And they died very young in the coal mines.

But that is a story you can hear anywhere you want to hear it in the coalfields of this country. I have testified over and over and over again here, not in this room per se, but here in Congress. Starting in 2003, and two other times, particularly about the black lung problem and what it does to miners, and what we need to do.

I want to follow-up on what the doctor said here, if he doesn't mind. There are thousands of polls out there. And the most sin-

cere—excuse me, the most dangerous type of black lung is progressive massive fibrosis that the doctor alluded to.

We all understand something, if you contract this, you are going to die. And the average lifespan once you contract this form of black lung is 3 years. That is the average lifespan of somebody who contracts this. And this is happening in too large of numbers. And we know where it is.

We know, everybody in here knows where it is. It is in Eastern Kentucky, Southern West Virginia, and Southwestern Virginia. And we testified to this in 2019, and we pleaded with the Congress of the United States to do something about this. And recently, we did have a victory. And that was for the first time we promulgated a rule dealing with silica.

This form of black lung is caused by silica. So how in the world did we get an area of the country where all these cases are originating in young miners? We are not talking about people who have spent 20 years in coal mines. We are talking about miners who spent 3 years in the coal mines.

We are talking about people in their 30's. And the news media is starting to pick up. And there has been a series—that voted to this problem of young people choking to death and dying because they went to work. So, my position has been, and our union's position is, if we know what is causing this and we know where it is, why do we continue on? But I want to point something out, if I might.

I don't mean to be too aggressive about this, but somebody has got to be. This is the story of this industry. And I have said repeatedly that most coal companies try to do the right thing, but we have to come to grips with some reality here. Some do not. It is like saying, everybody who drives on the road, drives safely, and we know that is not true.

We also know that people commit crimes. It would be like saying we don't need to police anymore because everything is resolved. But it took a 100 years, a 100 years before the first law was ever passed by the U.S. Government that protected the working coal miner—100 years.

It was in 1969, and that wouldn't have happened had not we had an explosion in Northern West Virginia that the entire nation watched on television. And then we created the Black Lung Program with that law, and we said for the first time, for the first time ever, we recognized black lung as an occupational illness.

We never did that before. And the truth of the matter is, this industry claimed that there is no such thing as black lung or pneumoconiosis until 1969. That is a fact. And they also said, if you make us abide by these laws you are passing, we are going to go out of business and go bankrupt.

That wasn't true. And we have lived with these laws for a long time now. But now we have this. If you think it is bad, tough to work in a coal mine, get sick. Get pneumoconiosis and try to get benefits. And here is the problem, we have rich people, we have lawyers saying that I am not sick, and we have me or another coal miner trying to hire a local guy to represent me.

That is not fair. It is not balanced. People are sick. They are out working, and they should be recognized for that. And they should not have to live on \$700 something dollar or die. And that is the way the program works.

It is unfair. It needs to be made more fair. And that is coming from the heart of a coal miner who has seen too many people die from this.

[The prepared statement of Mr. Roberts follows.]

PREPARED STATEMENT OF CECIL ROBERTS

Good morning, Chairman Hickenlooper; Ranking Member Braun and the Members of the Committee on Education, and Labor in attendance today. My name is Cecil E. Roberts, International President of the United Mine Workers of America (“UMWA”). In that capacity, I represent the largest unionized group of active and retired coal miners in North America. However, today, Mr. Chairman, I come before the Members of this distinguished Committee as the representative of every coal miner in this Nation, whether an active dues-paying member, a retiree of the UMWA, or a coal miner who is working in the industry and has not yet joined the ranks of the Union. In short, I am here to be the voice of the miners who have risked their lives and health to energize and build this Nation, no matter where they live and no matter their affiliation with organized labor.

This Committee plays an important role in addressing employees’ health and safety. I would like to express my particular appreciation to the leadership of this Committee for your efforts directed at protecting and enhancing the health and safety of coal miners throughout the Nation. Your continued attention is critical to dealing with the challenges that all too often prevent some miners from being able to go home safely at the end of their shift. After all, going to work, whether as a coal miner or other worker, should be a means for earning a paycheck and providing for your family, not a roll of the dice about whether you will live to see another day.

The testimony I will present to this Committee today will outline the struggles coal miners face every day in this country. These struggles exist not just for miners who are actively employed in the industry but also for those who have left the mines, whether they retire after years of hard work in dusty and dangerous conditions or are forced from their jobs by occupational injury or illness. I will focus my testimony on the specific topic of this very important hearing: the effects of Coal Workers’ Pneumoconiosis (“CWP” or “Black Lung disease”) on the lives of America’s coal miners.

According to data from the Center for Disease Control (“CDC”), the National Institute for Occupational Safety and Health (“NIOSH”), the Mine Safety and Health Administration (“MSHA” or “Agency”), and a host of independent studies, the highest concentration of these historic increases in the disease are occurring in the central Appalachian Region of the United States. This area includes all or parts of Kentucky, Ohio, Pennsylvania, Virginia, and West Virginia.

As you may know, this is not the first time I have come to Capitol Hill to speak on behalf of coal miners regarding the dangers of Black Lung disease. Studies have consistently shown there has been an alarming resurgence in the number of Black Lung cases, including the most severe form of the disease known as Progressive Massive Fibrosis (“PMF”). I have been here before to discuss that risk.

This is not a new or unprecedented danger in the Nation’s coalfields. We know this disease, we know what causes it, and we know how to prevent it. The industry and the Federal Government have known for years of this resurgence. I have testified in the past about the failures of MSHA’s dust control rules and policies. I have testified before about the nefarious methods that operators have used to circumvent mandatory dust monitoring. The UMWA has recommended methods and ways of improving the sampling system and that might have helped head off this resurgence.

However, it was not until recently that the Mine Safety and Health Administration (MSHA), under its current leadership, took meaningful steps to protect miners from silica dust and Black Lung disease. First, in June 2022, the Agency launched its Silica Enforcement Initiative (SEI). The SEI increased silica sampling and fast-tracked the deployment of significant measures to slow, stop, and reverse the escalating rates of extreme overexposure to silica dust, especially at thin-seam coal mines where sandstone exposure is most pronounced. Then, in April 2024, building

on that record of innovation and success, MSHA published a historic final rule placing an enforceable limit on respirable silica dust in America's mines. While we believe it could be further improved to better protect miners, we believe that rule will set us on the path to achieving our goal of ending this debilitating lung disease among mine workers.

If you hear me say something that I have already raised in May, 2003 (the first time I testified before a congressional Committee on this issue), July, 2010, March, 2012, or then again in June 2019, consider it an indictment of the government's failure to take seriously the known threat of Black Lung disease. Know that I repeat myself today because, since May 2003, over 20,000 miners have died in this country from Black Lung. And if Congress again fails to act, that number is expected to skyrocket in the coming decades. Those are deaths we know how to prevent, but this body has not taken the action needed to do so. I will not stop repeating these truths until Congress listens.

The Union would argue that the seeds of the recent wave of Black Lung were sown by the actions of Federal agencies and coal operators whose primary job is to protect the health and safety of the Nation's miners. This epidemic was further propagated by medical and legal professionals who profited from the misery of those miners unfortunate enough to contract this horrible disease. The fact is, Mr. Chairman, Black Lung is a preventable occupational disease that would have been eradicated from the industry years ago, but for the greed of the industry and the failings of those who are charged to protect the Nation's miners.

#### **Previous Congressional Hearings**

On July 13, 2010, and again on March 27, 2012, I came before the House Committee on Education and Labor and the House Committee on Education and the Workforce, respectively, to discuss the disaster at Massey Energy's Upper Big Branch Mine South ("Upper Big Branch" or "UBB") in Montcoal, Raleigh County, West Virginia (attachments 1-2). While the overriding context of that testimony dealt with the events leading up to the mine explosion and its aftermath, the information I submitted and the testimony I gave predicted that if action was not taken by Congress and MSHA, we would witness the Black Lung crisis we are discussing today.

The Union has been raising the concerns routinely for years. I have enclosed the past several years of the UMW Journal (attachments 3-12), the official publication of the Union, that chronicles the Union's continual attempts to bring these problems to the forefront of public debate. However, like so many other efforts to protect workers, the legitimate warnings about Black Lung the Union has raised have not been heeded.

The conditions in the Upper Big Branch mine, specifically the amount of coal dust that exploded and killed 29 miners, present a microcosm of the dust problem that has haunted the industry for almost two centuries. While the UBB disaster could still provide fodder for hundreds of congressional hearings, what is important to the topic we are here to discuss today is that the thick layers of coal dust that filled the entries of the UBB were not restricted only to the mine surfaces. This respirable and deadly dust also lined the lungs of the workers at that operation, slowly but surely killing the miners. In my 2012 testimony, I specifically referred to the fact that autopsies performed on the miners killed at UBB showed the majority of them had some level of Black Lung Disease. This is true of some of the youngest miners who lost their lives in the disaster.

Further, the report issued by the Union after the disaster, "Industrial Homicide," (attachment 13) stated, "The fact that miners worked in such a dusty atmosphere offers great insight into the prevalence of Black Lung disease in many of the miners killed in the disaster. Of the 24 miners, between the ages of 24 and 61 whose lungs could be examined during autopsy, 17 miners or 71 percent, showed some stage of Black Lung." With respect to the mining practices at UBB, the report noted that the practice of running the long-wall shearer without the required water sprays amounted to, "... reckless disregard for the law ... And over the long term, exposure to uncontrolled coal mine dust greatly increases miners' chances of contracting Black Lung disease."

Mr. Chairman, the UBB disaster occurred on April 5, 2010. It is not ancient history. More importantly, based on the information that is available, it is clear that this type of illegal activity on the part of many coal operators were and still are accepted practices in the industry. There is a clear and uninterrupted pattern of behavior on the part of the coal industry that runs back to the earliest days of the

Respirable Dust Sampling Program. Tragically, even the spotlight shone on the issue by martyrs of UBB could not put an end to the industry's reckless behavior.

#### **After the Diagnosis**

For most miners who have contracted Black Lung, the difficult and deadly process is only just beginning. The reality is that rather than accept the responsibility for their actions and seek to compensate disabled miners and mitigate the effect of the disease, coal operators and others do everything in their power to shirk that responsibility. It is not confined to dust sampling and Black Lung. I could fill the congressional record with stories of operators disclaiming responsibility for anything and everything that happens to miners they are charged to protect. But when it comes to Black Lung, it seems that the excuses and evasions never end. Too many operators will stop at nothing to avoid paying for Black Lung benefits. It's a sad situation that just keeps playing out over and over again.

There are countless stories of miners who have contracted the most severe form of Black Lung disease, PMF, but were unable to receive the benefits they were owed. These miners are examined by medical experts from the U.S. Department of Labor and their own doctor to confirm their worst fears only to see their employer contest their eligibility in administrative proceedings, sometimes for decades. The truth is that, almost without exception and despite overwhelming evidence supporting the miner, coal operators still refuse to recognize the miners' disability. The premise behind the operator's decision to deny benefits is simple: The delaying effort allows them to rely on time and money, two things most miners with the disease don't have. The immorality of their actions is also simple: it is reprehensible.

The expense of pursuing the claim can cost the miner tens of thousands of dollars they do not have and most lawyers familiar with the Black Lung legal system know the return on their investment in time and research is meager at best. So, after an initial filing and a series of hearings before an administrative law judge, most miners cannot afford to continue the fight. The case is dropped, the company wins and the miner suffers in obscurity until the disease causes their lungs to fill with liquid and they drown.

Perhaps one reason the company wins so many Black Lung claims is a rule employed by the Department of Labor's Administrative Law Judges ("ALJs"), and the Benefits Review Board that oversees those ALJs, that denies benefits when the evidence supporting and the evidence refuting a claimant's Black Lung diagnosis is equal. Under the adversarial system created to administer the Black Lung Benefits Act, claimants and their former employers will each submit a certain number of X-ray readings, a certain number of spirometry and blood gas results, and a certain number of medical reports to prove their case.

The miners will present evidence showing they have Black Lung and are disabled. Operators will present evidence showing they are not sick or are not disabled. As I will discuss later, the evidence presented by operators is sometimes inaccurate or downright fraudulent. Nonetheless, it is easy for an ALJ to look at the submitted evidence, determine that all the doctors involved have equally impressive credentials, and decide the evidence is equal. And, finding the evidence is "in equipoise" those ALJs then deny the claim. In short, if an ALJ cannot or will not make up his or her mind about the existence of disabling Black Lung, the miner pays the price.

Under the current circumstances, should a miner have enough resources and find an attorney willing to accept and stick with their case to continue the fight for benefits, the employer's legal team relies on the passage of time to settle the case. Miners with PMF have a limited time left on this earth. Through court hearings, delays, appeals, and any number of stalling tactics, the miners' time is slowly drained away as the case languishes in the system. Ultimately, the miner will suffocate and die. But, for the mine operator and his legal team, the case is over and no benefits are paid. It's a win for them no matter what the cost in human tragedy!

Unfortunately, the truth about these despicable tactics by mine operators and the law firms they hire with the profits from the miners' labor is that they work.

#### **Legislative Reforms to the Black Lung Benefits Program are Needed**

The UMWA is grateful to Senators Casey, Kaine, Brown, Manchin, Fetterman, Warner, and Warren for reintroducing the Black Lung Benefits Improvement Act (S. 3304). Although the last formal Senate hearing on Black Lung was held in July 2014, I would be remiss if I did not note that there has been important legislative action over the past 10 years, especially with regard to permanently restoring the

Black Lung excise tax to fund the Trust Fund, increased appropriations for Black Lung clinics, and a boost in funding to cut the backlog on claims before Administrative Law Judges.

### **The Black Lung Benefits Act Claims Process is Both Adversarial and Daunting**

The Black Lung benefits adjudication process is an adversarial system. An adversarial system only works to deliver justice, however, when both parties to the dispute have an equal opportunity to participate.

Coal operators have leveraged their formidable legal resources and medical experts to frequently overwhelm the capacity of disabled miners and their families to secure benefits to which they are otherwise entitled.

Governmental and journalistic investigations have identified numerous impediments to claimants' ability to obtain Black Lung benefits, including:

- Challenges in obtaining legal representation and developing medical evidence to support a miner's claim;
- Obstacles to fair adjudication of claims because of dubious strategies employed by coal operators' lawyers and experts; and
- Bureaucratic delays in the processing of claims applications.

### **Expanding Availability of Legal Representation for Miners in Claims Process**

A 2009 GAO report (Attachment 14) about the Black Lung program found that securing representation is a significant challenge for many Black Lung claimants and that "claimants' lack of representation, particularly in the early stages of a claim," is "a significant barrier to successful claims." DOL's Office of Administrative Law Judges (OALJ) confirmed "that few attorneys will represent Black Lung claimants and that lack of legal representation limits OALJ's ability to process cases quickly."

DOL data continue to bear this out more than a decade later. In the last 10 years, most claimants have lacked attorney representation at the District Director level. The rate of attorney representation has fluctuated from a low of 25 percent in 2013 to a high of 47 percent in 2019. Although lay representation has increased at the District Director level in recent years following an increase in funding for Black Lung clinics, fully 36 percent of claimants lacked attorney or lay representation in 2023. There is a good reason there is such a small pool of attorneys willing to take on these difficult cases.

The nub of the problem was explained in GAO's 2009 report:

"[A]ttorneys are not inclined to take claimants' cases due to a low probability of success . . . and the process can be lengthy and costly. For example, one attorney told us that it has taken as long as 15 years from the start of a Black Lung case to receive compensation for working on it. Because claimants lack financial resources for evidence development and DOL's payment of claimant attorneys' fees is contingent on the success of cases, claimant attorneys bear much of the legal costs during the litigation of claimants' cases."

In BLBA cases, a claimant may not be charged a fee by an attorney, and fees are not paid by the operator (or Trust Fund) unless Black Lung benefits are awarded. Disputes over attorney fees usually require a separate round of litigation. To incentivize more attorneys to take on Black Lung cases, the Black Lung Benefits Improvement Act creates a reimbursement mechanism where an attorney could be awarded a partial fee through the Trust Fund if they are successful at various stages in the claim proceedings (up to a maximum of \$4,500), and then that payment from the Trust Fund would eventually be paid back by the operator if the award is upheld. Attorneys may also seek reimbursement of up to \$1,500 at each level for medical costs. This applies if the claims take longer than 2 years to finalize.

### **Securing Sufficient Medical Evidence to Establish Entitlement to Benefits**

Miners' challenges in obtaining counsel are intertwined with their difficulty in developing the medical evidence needed to support a claim. This issue is particularly acute at the earliest stages of the claims process. Both GAO and the DOL Inspector General (DOL-IG) have urged DOL to assist claimants in securing better quality

medical evidence, because this speeds up cases, reduces appeals, and improves fairness.

A Pulitzer Prize-winning series of investigative reports in 2013 (Attachment 15) by the Center for Public Integrity (the Center), coupled with reporting by NPR, ABC News, the Charleston Gazette, and others, uncovered patterns of deception, suppression of evidence, and willful distortion of diagnostic tests by coal operators' counsel and medical experts aimed at preventing miners and their survivors from obtaining the benefits to which they were rightfully entitled.

Radiologists working at Johns Hopkins Medical produced reports "almost unwaveringly negative for Black Lung," but one expert in particular, Dr. Paul Wheeler, was "the leader and most productive reader for decades." The Center found that, in more than 3,400 X-ray readings involving more than 1,500 cases, Dr. Wheeler had never once interpreted an X-ray as positive for complicated pneumoconiosis, preferring instead to apply his own idiosyncratic criteria which were "at odds with positions taken by government research agencies, textbooks, peer-reviewed scientific literature, and the opinions of many doctors who specialize in detecting the disease, including the Chair of the American College of Radiology's task force on Black Lung.

Following this report, Johns Hopkins Medical permanently shut down the program. But Hopkins never released its internal review which led to this closure.

In the span of 13 years alone, miners lost more than 800 cases in which doctors found severe Black Lung while Dr. Wheeler offered a contrary opinion. Ultimately, DOL notified approximately 1,100 miners that their claims may have been wrongfully denied because of Dr. Wheeler's involvement.

Unsurprisingly, the problem of dubious medical evidence polluting the claims process was not remedied merely by closing the mill at Johns Hopkins. Academic studies have found consistent bias in medical opinions proffered by physicians hired by coal operators. The researchers identified 55 operator-hired B-readers who provided negative readings in more than 99 percent of their assignments. "Although the radiograph data ended in 2013," the researchers point out, "nearly all the physicians are still classifying radiographs today, and many of these cases are still pending."

In 2014, DOL sought to address this imbalance by providing additional assistance to miners who met the criteria for the 15-year presumption under the law. In addition to the legally mandated DOL medical examination, DOL also provided claimants with access to a supplemental medical opinion from the DOL-approved medical examiner after evidence contrary to a preliminary finding supporting benefits entitlement was submitted for consideration by the responsible operator. Prior to this, DOL only funded one medical opinion to miners. This additional medical opinion involving evidence supplied by mine operators not only assisted miners and improved the quality of decisions, but even reduced the need for so many appeals.

However, this DOL initiative is too limited. It needs to be expanded to cover claimants who do not meet the requirement of 15 years of underground coal employment, as we know many miners are getting Black Lung diseases at an earlier age and with shorter tenure due to, in part, increased silica exposures. If necessary, Congress should legislate this expanded medical review.

### **Increasing Benefit Levels and Adjustments for Inflation**

Benefit levels under this law are woefully insufficient. The monthly benefit, which is pegged to 37.5 percent of GS-2, Step 1 pay schedule, is a meager \$772.60 per month and is adjusted upwards with dependents—plus medical benefits for the related medical condition. This merits re-examination.

Further, because the monthly cash benefits are pegged to the Federal employees' pay scale, any Federal employee pay freeze means that miners and their surviving dependents do not receive a cost-of-living adjustment. As you may recall, in response to the budget deficit and political pressures, a Federal pay freeze was implemented for fiscal years 2011 through 2013. And Federal pay increases fell short in fiscal years 2014 and 2015. It was not until 2016 that the Federal Government reinstated full cost of living increases. These political choices have permanently sliced benefits for disabled coal miners. Congress needs to legislate a catchup adjustment and establish reforms to peg the annual cost of living adjustments to the consumer price index—not Federal employee pay adjustments.

Finally, preventable delays in claims processing need to be addressed. One of these is the process for verification of employment. According to the DOL-IG, DOL still uses a manual, paper-based system to request employment records from the Social Security Administration (SSA) "because it does not have the statutory authority

to directly access SSA's data base." That outdated mode of communication adds time to the Black Lung claims process.

### **Summary of Key Reforms**

We are pleased the Black Lung Benefits Improvement Act contains a number of these reforms and note that the House Committee on Education and Labor marked up similar legislation in the last Congress. The UMWA urges the Senate to prioritize legislation that:

- Increases miners' benefits and ensures benefits are adjusted for inflation to benefits from losing value during any future government employee pay freeze.
- Speeds benefits by authorizing DOL to get employment and earnings verification for miners from the IRS. Enables more miners to get legal representation and assistance in securing medical evidence.
- Expands DOL's program to provide supplemental medical opinions by DOL medical examiners.
- Expands access to CT scans to assist in the diagnosis of Black Lung disease when a conventional lung X-ray fails to provide a definitive image for diagnosing complicated pneumoconiosis.
- Increases the authorization of funding levels for Black Lung Clinics.
- Ensures accountability for operator misconduct in the claims process.

### **Trust Fund Solvency and Self Insurance**

The purpose of the Trust Fund and the Black Lung Benefits Revenue Act of 1977 was to ensure that coal mine operators, or the coal industry, will fully bear the cost of Black Lung disease for the present time and in the future.

As such, benefits are to be paid by "Responsible Operators" or their commercial insurers. If a mine operator is self-insured and declares bankruptcy or ceases business operations, the Black Lung Disability Trust Fund (Trust Fund) assumes responsibility for paying benefits to these miners. The Trust Fund, which currently pays benefits to 52 percent of all finalized claims, is financed through an excise tax on coal that is mined and sold domestically. Exported coal is excluded from the excise tax. Today, the Trust Fund is \$6.4 billion in debt.

We commend the Senate for permanently restoring the Black Lung Excise Tax rate as part of the Inflation Reduction Act in 2022. This was essential to prevent the Trust Fund from going even deeper into red ink, as was projected by the Government Accountability Office.

However, given the already dropping production and utilization of coal domestically, we believe it is time to examine extending the tax to exported coal. The U.S. Energy Information Agency predicts that coal utilization for domestic power generation will drop to near zero by 2050. The only significant market remaining at that point will be exported coal. However, there will be no income to the Trust Fund from the production of that coal. The Fund's deficit will never be wiped from the books without extending the tax to exported coal.

### **DOL Rule to Reform Operator Self Insurance is Languishing and Must be Issued**

While coal production is declining, and excise tax revenues along with it, it is imperative to protect the Trust Fund from additional liabilities due to self-insured operators failing to maintain adequate collateral. According to a 2021 GAO report (Attachment 16), roughly \$1 billion in undercollateralized Black Lung liability was shifted into the Trust Fund in recent years. In some cases, large operators reserved as little as 3 percent of their current and future Black Lung liability when they filed for bankruptcy.

According to DOL, the risk of more red ink in the Trust Fund is growing: self-insured operators have reported \$700 million in current and projected Black Lung liabilities with only \$120 million on deposit with DOL. In the event of future bankruptcies, under-collateralization of these liabilities would increase the Trust Fund's indebtedness.

The good news is that the Biden administration has proposed to plug this leaky bucket through a proposed rule that would set a minimum collateral level of 120 percent of current and future Black Lung liabilities.

We think this is a reasonable approach because it mirrors the self-insurance rules that are implemented by many state workers' compensation programs.

I should be clear here, not all self-insured operators are failing to put up sufficient collateral. But by compelling self-insured operators to fully internalize the costs of current and future Black Lung liabilities as part of the cost of production, the proposed rule eliminates the unfair windfall that accrues to those operators who fail to fully secure such claims, while potentially incentivizing operators to reduce the incidence of Black Lung.

The UMWA has joined with a number of groups and Members of Congress in supporting this proposal. Although the comment period on this rule closed over a year ago, progress on getting it finalized has been far too slow. Earlier this month, the Department of Labor sent a final version to the Office of Management and Budget for its review (Attachment 17). We urge the Administration not to let this rule languish any longer, because what we have learned is that whenever there is a bankruptcy, there is a real risk that self-insured operators will shift unfunded liabilities to the Trust Fund and drive up the mountain of red ink.

While the Trust Fund can continue to borrow from the Treasury to cover benefits and administrative costs, at some point the red ink reaches a tipping point that jeopardizes the Trust Fund's solvency. In 1981, certain interests used a rising tide of red ink enact cuts in benefit eligibility. It took 30 years to reverse those cuts as part of the Affordable Care Act in 2010, but it left thousands of miners and their survivors without recourse in the interim.

It is past time for DOL to move forward on this rule, as this problem has been festering at great expense to the Trust Fund for over a decade.

### **Closing Remarks**

The sad fact is, no matter how far we seem to come in this country, whether it is advances in science, technology, medicine, or a host of other subjects, some things never seem to change. I suppose many industries deny the problems they cause, but some of the people who own and operate coal mines can be the worst. They argue that they should be allowed to make as much money as possible on their investment without government interference. Then, when their actions cause major economic, environmental or health problems, they want the government to force taxpayers to bail them out. They want to keep their profits private but socialize their losses. It is time Congress held these businesses responsible to pay for their misdeeds, not the American taxpayer.

Statistics from the mining industry offer dramatic proof that improved laws and regulations make a huge difference in workers' safety. We recently celebrated the 45th anniversary of the mining industry's key legislation, the Federal Coal Mine Health and Safety Act of 1969. In the 40 years before that landmark legislation, an average of 803 miners were killed in coal mines each year; and in the 40 years since it was enacted an average of 83 miners were killed.

While these numbers prove beyond a doubt that strong laws make a huge difference, more must be done. We are here today to talk about what could and should be done to change a system that still allows miners and other workers to die at work or as a result of their work, whether from preventable occupational illnesses or from avoidable work-site tragedies.

Unless operators do what the law requires of them each and every day—not just when a government inspector is physically onsite—miners will continue to be exposed to needless hazards to their health and safety. Too many will be injured, too many will be made sick, and too many will pay the ultimate price with their life.

These challenges have persisted for decades, if not longer. I have been here repeatedly, and my predecessors before me, to complain about the terrible conditions miners endure when operators don't follow the law and miners are killed as a result.

Turning to the factors that adversely impact miners' health and safety, we must start by looking at the operators and their mines. First and foremost, it is every operator's responsibility to provide a safe and healthy workplace. Many try to do that. Yet too many do not. Corners are frequently cut, which means that miners' health and safety get sacrificed.

Operators who invest in equipment and training to make a mine safer should not have to compete against those who refuse to make these needed investments. In the end, it's miners who pay the price when operators do not adhere to what the law requires. But so long as there are good paying jobs in mining, there will be workers willing to take the work hoping and praying they will be the lucky ones. Working

in America in the 21st Century should not require such a gamble. And unless operators start running their mines consistent with what the law requires, we will continue to witness miners dying.

The Union and coal miners have hailed MSHA for releasing its new silica rule as the dawn of a new day in improving coal mine health and safety. We have seen some improvements, but we still have a long way to go. MSHA should be given additional funding and resources to enhance its ability to enforce the law.

I believe that the facts that have been laid out at this hearing and the facts that have been available in the public domain for decades are sufficient to demand action by this Committee and ultimately by the entire U.S. Congress. There is no longer an alternative, and there can no longer be excuses. The carnage in the coalfields from this preventable disease must stop.

Mr. Chairman I would like to take this opportunity to thank you, Ranking Member Braun, and the entire Committee for allowing me the opportunity to testify at this extremely important hearing. The nation's miners are some of the hardest working, dedicated, and patriotic people in this country. They have made great sacrifices to protect and energize the Nation. They are willing to continue providing whatever is necessary to keep our Nation strong and moving forward. They would simply request that their sacrifice be rewarded with a long retirement, not cut short because of Black Lung disease. Mr. Chairman, the miners have waited for congressional action far too long. Thank you.

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Senator HICKENLOOPER. Thank you, Mr. Roberts.  
Dr. Schafrik.

**STATEMENT OF STEVEN SCHAFRIK, PH.D., ASSOCIATE PROFESSOR OF GRADUATE STUDIES, MINING ENGINEERING, UNIVERSITY OF KENTUCKY, LEXINGTON, KY**

Mr. SCHAFRIK. I would like to thank the Subcommittee of the U.S. Senate Committee on Health, Education, Labor, and Pensions for the opportunity to discuss important topics for miners safety. Your staff has been excellent, and I hope to continue to work together with them.

My career as a researcher has been working on the difficult challenges that face the mining industry. The main goal of this work has been to create solutions that help the miner work in a safe, healthy, and productive environment.

In our industry, the details matter and every side is as varied as the Earth's crust, but I am going to be talking in general terms. Extracting useful minerals involves breaking, moving, and, or processing tons of rock.

Making a rock or anything smaller generates dust. Dust generation, characterization, monitoring, and suppression are all important topics with a wealth of information, and my written testimony discusses them in more detail than I will today. Thus, monitoring the laboratory and in the field are very different.

We have excellent tools for research lab experiments but not so many to use in the field. NIOSH's mining division has developed several technologies for monitoring and evaluation of dust, like the fast method for silica exposure in coal mines, and the CPDM for real—which is a real time tool for overall dust exposure.

What we lack is a real time tool for all miners, specifically for silica exposure. It would help if it were OSHA compliant too. NIOSH has been soliciting for such a device to be developed for the last few years in anticipation of the silica rule.

These projects have had mixed results, but I believe that we can get there with an effort similar to the one put forth on the communication and tracking problem. In my work, I want to get the dust out of the air.

In a NIOSH funded effort, we investigated the impingement screen on flooded bed scrubbers used in underground coal mines because the screen can be clogged, making it less effective. We have developed a field trial—and field trialed a maintenance free screen to replace it.

Our field trials met airflow requirements and were well received by the workers but had disappointing cleaning results. We are currently working with Virginia Tech and the NIOSH Pittsburgh Mining Research Division to improve the design.

We have also developed a radical style of filter that is based on a filter type used in automotive spray boots and is extremely difficult to clog. This shows great results in the lab and can be used as a standalone area filter.

I am working with an international manufacturer to make a prototype in trial at most likely in South Africa. I think this kind of filter would be useful for off-earth mining and exploration applications, where dust impacts on the machines and astronauts can be easily overlooked. In this industry, if it is easy to do, it has already been done.

The only way to keep us—keep up is to increase our technology, which means more engineers. The technology developed in the mines is important to many other industries, as our products. Modern mining machines resemble robots much more than shovels.

They rely on the expertise of the worker to operate safely and efficiently. But we have the mineral resources. And thanks to efforts by NIOSH and SME, we also have the educational expertise. But we lack the public will to encourage highly talented engineering students to pursue a career in the mining industry.

The rhetoric around the mining industry is pushing away talent. The No. 1 question I get from parents of prospective engineering students is, will we still have mines in 5 years? It is not just parents asking that. It is executives at major technology companies too. To meet the challenges of the day, we need more engineers working together on the dust problems.

Those engineers need to have a deep understanding of the processes from the mine face to the load out, and the particular needs in each place. They need to have—they need to take a risk based approach to solve this as efficiently as possible.

Inefficiencies at the beginning of the production chain affect everyone in society. I thank you for your time and attention, and I am looking forward to some questions.

[The prepared statement of Mr. Schafrik follows.]

PREPARED STATEMENT OF STEVEN SCHAFRIK

I'd like to thank this Subcommittee of the U.S. Senate Committee on Health, Education, Labor, and Pensions, and the Subcommittee for the opportunity to discuss this important topic of miner safety.

I am an Associate Professor and Director of Graduate Studies for Mining Engineering and a Faculty Fellow of the James B. Beam Institute for Kentucky Spirits

at the University of Kentucky. I currently teach circuits, programming, mine design, ventilation, and automation at the undergraduate and graduate levels. My research is in automation, communication, ventilation, and training. I have two patents for dust filtering technologies. I am the founding Secretary/Treasurer of the Eastern Collegiate Mine Rescue Organization and the faculty advisor for the University of Kentucky RescUKats. I am very active in our professional society, the Society for Mining Metallurgy and Exploration, where I am currently the Chair of the Coal and Energy Division.

Much of this work has been developed under several CDC NIOSH contracts. The views and data are from me and in no way represent the views or opinions of the CDC, NIOSH, or any of its employees.

Much of the work described here was performed by nearly a dozen researchers at the University of Kentucky, Virginia Tech, particularly Dr. Emily Sarver; Penn State, particularly Dr. Ashish Kumar; and Missouri University of Science and Technology, particularly Dr. Guang Xu. Much of the testimony I will be describing and generalizing about mining technology, and there will always be exceptions to my comments. My comments are aimed at a general audience and not at specific mines or specific mining operations.

### **Sources and Characterization of Dust**

There are various sources of dust in mining operations. Mining operations, by definition, extract minerals from the earth's crust for society to use. These minerals are used for anything from cosmetics to electric power to the metals that make up every piece of electronics. It is a truism that if something is not grown, then it has to be mined. Even though some of the things that are grown don't need to be mined, the tools that we use in order to harvest things that are grown are mined.

Most mining operations involve breaking stones using explosives or mechanical means to extract valuable minerals. These minerals are then used to produce items that are bought and sold every day. Mining is the beginning of the value chain for every product in society.

When a rock or any rigid body is broken, it creates dust, even if it's something that is cut. Cutting things with lasers, saws, and everything else will still create dust. The particular size and chemical makeup of the dust determine its health effects. Not all dust is created equally.

Mining operations have their own characteristics. Most of the mining operations in the United States are surface mines. Most of the mines in the United States are classified as metal/non-metal (M/NM), which means they produce a commodity other than coal. Most mines operate by what we think of as the classic mining cycle. That is, they drill holes and load those holes with explosives to provide the energy to break the rock. This leaves them with a pile of rocks that should be suitable for loading into a haulage system. They are hauled to a location and dumped in that location, and the production cycle continues. The rock is then processed. It is either sold as-is, crushed to smaller sizes, and/or processed in a mineral processing plant and then sold.

Dust from drilling is well known to the general public. Drilling was one of the most dangerous occupations when mechanization was first introduced into the mining and tunneling industries. The Hawk's Nest tunnel construction in West Virginia famously accounted for hundreds of cases of silicosis. This construction was before the adoption of the Jack Leg Drill, which was a step change in the safety of the miners. Most corporate mining operations today will use remote drilling machines that move the worker even further away from the drilling operation. The reduction of dust from drilling is a success in the mining industry, with the techniques adopted anywhere else where rock and concrete are drilled.

During loading, dust can be disturbed and created from the rocks running against each other. This process is done by machines where the operator is in the cabin and away from the digging. They are loading haul trucks, or equivalent, that are similarly operated from a cabin. Hauling can create dust from the trucks themselves or whatever haulage is used, stirring the dust up from the road or disturbing it in the loaded material. There are ways that we handle that with water sprays, and dumping creates dust, but this is also an activity where there's generally not a human being around. They will employ a negative pressure system and or water sprays in dust-related operations.

Surface coal mines in the United States operate in much the same manner as surface M/NM mines. However, the hard rock above the coal seam requires hard digging, while the softer coal is generally not blasted but is directly dug. Under-

ground coal mining and soft rocks, such as trona, can be mechanically mined using a continuous mining machine or, under the right circumstances, using a long-wall system. In these mining methods, the rock is broken with a mechanical drum with cutting heads on it. The drilling, blasting, and loading are all done by mechanical means within the machines. The cutting heads come around, make contact with the mineral, break it away from the earth's crust, and knock it down into some form of gathering system. On a continuous mining machine, gathering arms move around and pull the broken ore into the machine's body. It's loaded onto a conveyor belt and can be loaded onto a shuttle car or similar haulage system and taken to a dump, moves the material onto a conveyor belt, and takes it outside.

In a long-wall system, the conveyor belt is called a pan line, and it runs underneath the long-wall shearer's head. The shearer is two drums with cutting heads that move back and forth across a face of coal. The coal face is typically between 800 and 1,500 feet wide, depending on the geologic and economic conditions. Coal and the rocks around it are cut and dropped directly onto a set of conveyor belts to take it outside. It's a very highly productive means of mining.

With all kinds of mining, we have modeled the material that we are mining, but no model is perfect. The geological conditions will dictate how much out-of-seam material will be mined. Material that is not economical to sell is not desirable to mine, although in some cases it must be mined in order to fit equipment and people into the underground opening. In surface mines, the material that overlays the ore body generally must be moved or disturbed to get to the ore body.

Focusing on underground coal, the high-quality thick seam coal deposits are being mined out. A lot of economical coal seams are thinner than in the past. Sometimes, the coal is not as thick as the cutting head, and often, especially in central Appalachian coals, the rock surrounding the coal must be taken. That rock can be the source of silica dust or the nature of how the coal was formed, which made it contain silica. What we've seen in dust characterization studies, especially those that were done at Virginia Tech under Dr. Sarver, is that it doesn't necessarily depend on how much out-of-seam material is being mined. It may just depend on the mineralogy of what is being mined. In the case of Central Appalachian coals, there's mineralogical evidence that more silicates and silicon dust are generated even when the mining height is predominantly in the coal. This same trend has not been found outside of the Central Appalachian coals. The study looked at more than 20 room and pillar coal mines both inside of Central Appalachia and outside of Central Appalachia.

### **Dust Exposure Reduction and Mitigation**

We've been producing dust in mines for thousands of years and have determined many different ways to deal with that dust. Personal dust masks that are both passive and active will not be discussed, I will focus on engineering and administrative controls and not personal protective equipment. The first and simplest way is to inject water at the cutting or dust generation point. In the drills, dust is generated at the end of the cutting tool. There's a water stream that captures the dust. This traps the dust the second that it's made. That's been a highly effective method. In fact, that technique was the innovation in the Jack-leg drill mentioned above. This can commonly be seen on construction sites where water is injected immediately to capture the dust.

The U.S. Bureau of Mines did a lot of work optimizing the angle of attack for mechanical breakage to reduce the amount of dust generated. Common in underground working is having a lot of airflow and keeping flow away from the workers. When the dust is created is blown away from where people are located.

In many mines, the best way to keep the workers away from the dust is to keep them in enclosed cabins. They may be in a heavily dusted machine, but they do not experience any dust because their cabin is enclosed, and these machines often have various filtering techniques for the cabin air.

There is a type of continuous miner that injects water at the point of cutting, called a wet head. In some mines, water spray bars behind the cutting head knock down the dust. Coal and clays are hydrophobic and are not as easily mixed with water. It's common in underground coal to filter or scrub the air after the mechanical cutting. These devices are called flooded bed scrubbers on continuous mining machines or scrubbers, and I'll be talking about those more later.

Another fairly new technique in the industry, but it's not uncommon is air curtains. These can generally be found on drills, such as the roof bolting machine, and

haulage like shuttle cars. These are jets of filtered air blowing down around where a worker is working, keeping dust from encountering that person's work area.

This is very similar to the air curtains found in grocery stores between refrigerated sections and the rest of the store. These are needed where you cannot put that operator into an enclosed cabin because of the job's nature or the mine opening's size.

Dust is generated from explosions both on the surface and underground. Time and distance are taken away from those explosions, reducing the dust exposure for the workers. Areas that are blasted must be inspected before workers are allowed to enter them and that has kept the dust exposure down as well.

Automation as a dust control technique is gaining more acceptance and will be discussed later.

### **Novel Approaches to Dust Capture**

The continuous miner scrubbers have somewhere between 60 and 90 percent dust reduction, although they have a maintenance issue where the impingement screen is prone to clogging. The way that these systems work is they have a shroud over the continuous mining machine that is behind the cutting head. Dust is generated by the cutting head passes over the shroud. Inside the scrubber, there's a fan pulling air into the shroud. That air is assumed to be dust-laden and goes through an impingement screen. That screen filters out the large materials. A water spray sprays water onto that screen, keeping it flooded with water. The air then enters the dust box and is treated with water. The dust box feeds into a demister device that pulls the water and dust from the air trapping it in a sump before it's ejected from the scrubber. The demister is thought to be responsible for most of the air cleaning.

Part of my work has been improving the impingement screen to reduce the amount of maintenance necessary by the workers. That research aims to test a maintenance-free flooded bed scrubber screen that would be acceptable for use in underground coal mining applications. This research had many challenges. The first challenge was creating a maintenance-free screen that won't clog and has the same air resistance as the existing screen. This way, no modification is needed to use it. We want a worker to pull the existing screen out and put in a new screen design. Another challenge is actually measuring the effectiveness because as you can imagine, this is all taking place in a part of the mine not well disposed to sensitive scientific equipment.

It's in permissible areas, which means that you have strict restrictions on the type of electronic equipment that can be used. You also move a lot of rock, which is detrimental to scientific equipment. I'm going to be discussing work done at the University of Kentucky. Aaron Noble at Virginia Tech took another approach, funded by the Alpha Foundation.

We started with an idea, and then we did a variety of computational fluid dynamics (CFD) to test how the idea would work and optimize it as best we could in simulation. We know that there are constraints to the software. Physical prototypes were manufactured and tested in a controlled lab environment and also in a dust gallery that we have at the University of Kentucky, which lets us work in a less controlled laboratory setting. This was an iterative process of testing and CFD, we generated several different generations of these screens. We were working with the manufacturer, Komatsu, to be sure that the screens would not harm scrubbers deployed in the field.

As part of this research, we found three mines willing to test the prototype screens in various ways. It's important to note that in these tests, dust was sampled in areas, not on workers. The workers were positioned away from the machines to reduce their potential exposure to dust. Because we were testing the safety device, we needed to ensure the workers were protected.

We used the Personal Dust Monitor (CPDM), which was critically important in these tests. There are just a few minutes of delay in the dust concentration, so you can see your exposure more or less immediately. It was originally designed as a research tool by NIOSH and is now used as an enforcement tool.

The design of our maintenance-free screens creates a torturous path for the air to flow through plates. Instead of going through a mesh where it can randomly hit a mesh screen, it's forced to make sharp turns. The larger, heavier particles won't be able to take the turn, will hit the plate, and be captured because they lose their momentum.

Working with Komatsu we did a variety of different testing on our screens and compared them to the existing screens that can be purchased today. In an example test, when it's clean using the existing screen a particular scrubber is flowing about 6,500 cubic feet per minute (CFM) and when it's dirty it's flowing about 5,500 CFM. The screen that we manufactured for Mine A was able to flow a little closer to 6,500 CFM and when it was dirty it was flowing 5,900 CFM. The screen that we manufactured for Mine B was running 6500 when it was clean, and the screen that we manufactured for Mine C was running 7,800 when it was clean and 7,200 CFM when it was dirty. It's important to note that the screens that we manufactured will clean themselves, and so even though the dirty flow decreases, it will increase again while running.

The mines took their existing screen and checked the airflow through it and checked the screen that we manufactured. In all cases, we were able to meet the project's first goal, which was to have no airflow difference. In all cases, there is a 1 percent or less airflow difference, within the measurement error range. Mine A&B only tested the screens for one cut, but mine C tested the screen on 13 cuts, seven of them with the new screen and six with the fiber screens. They found that, when loaded, the maintenance-free screen will allow 11 percent more air through the scrubber than the current screen. That's consistent with the lab testing that was done at Komatsu.

They liked the improved airflow, and that improved the visibility for the continuous minor operator while he was operating the machine. They knew that more air was being pulled into the scrubber. Unfortunately, it resulted in 53 percent more dust being measured downwind, which means that the screen is causing a change to the scrubber system, making it less efficient overall at reducing the dust amount despite having more air going through it.

We decided to take the prototypes and bring them back to the lab. While we were doing the work in the field, the NIOSH Pittsburgh Mine Research Division built a scrubber set up with the help of Komatsu. They have started instrumenting it so that they can do much more detailed work on the internal workings of the scrubber system. It had previously been thought that most of the dust collection was being done inside of the demister and not at the impingement screen. But our results show that may not be the case. The NIOSH setup has already been used to test the Virginia Tech vibrating screen from Dr. Noble's research, which will require a major change to the scrubber design.

Dr. Sarver's Virginia Tech research group is using NIOSH's lab to investigate our maintenance-free screen. Their preliminary results have shown similar results to our lab results. It's important to note that our lab results and their preliminary results are currently at lower air flows than scrubbers at the mines. This work is ongoing and is difficult because of the nature of the measurement devices. They are not designed to work at the high flows that are seen in mining machines and in most underground coal mines. Instrumentation work is ongoing to find the point that the maintenance-free screen changes the effectiveness of the scrubber. My hypothesis is that the maintenance-free screen is capturing the water from the water spray and choking the demister. We may need to change the spray nozzle to one that is emitting smaller water particles. All of this is being investigated right now and we just don't have, we just don't have results on it at this time.

Scrubber systems are not the only and best solution. Also, running more air through the scrubber is not always the best solution if the air is dirty. In previous work, we've seen that the running air through the scrubber can actually cause other problems because what it can tend to do is it can pull the fresh air coming in that is intended to get the dust and gas away from the continuous mining machine and pull it into the scrubber. Because the scrubber is creating so much negative pressure, it's pulling the clean air through before it can get dirty or mix with the gases being emitted.

Potentially, flooded bed scrubbers are not the best technology. Researchers prior to me at the University of Kentucky looked at a machine called the Vortecone. Most notably it's used in paint spray booths in auto automobile manufacturing in order to capture the spray particles out of the air. In the Vortecone, air is drawn through the system, accelerated, and spun. The heavier particles tend to move closer to the wall of the Vortecone. When they make contact with the wall, they become captured because there's also a water jacket that is introduced, creating a thin film of water all along the wall of these types of filters. Effectively, dirty air and clean water enter with air, and dirty water leaves with a very high cleaning efficiency. The Vortecone has a high resistance to airflow and will take a lot of energy to achieve the airflows that are necessary in mining conditions. More power is not always

available for airflow because the motors on the fans and the fans themselves can be loud.

This device is good at cleaning but not ideal for underground mining conditions or machines. We performed CFD development on these devices and physical testing to understand the cleaning mechanism and to adopt it to a horizontal orientation. We created a physical prototype and tested it in our lab and found that we were able to get better cleaning efficiency than the original as well as were able to drop the resistance to flow to approximately 10 percent of the Vortecone resistance. This allows the horizontal version, the Hortecone, to achieve the airflows necessary in mining conditions. We are investigating developing a standalone version of the Hortecone specifically for mines in South Africa.

There are tradeoffs in all the mitigation work. You want to clear all of the air in the area, but you don't want the maintenance of the filters to be constant. If it's too much, it won't be done.

The only way to find the balance, which will be site-specific, is to deploy good monitoring technology. There's a lot of monitor monitoring technology that has been developed. Much of the work that has been described thus far, all of the in mine testing and dust gallery testing, was done with real time dust accumulation that's reported by the CPDM.

### **Dust Monitoring**

In laboratory testing, we use devices such as the TSI DustTrak® that give excellent repeatable results. Those and others like it are excellent devices, but they can only work on extremely low flows of air compared to what we need in the mining industry. That is why we must do area sampling when developing dust mitigation technologies. Doing direct sampling of the air stream is difficult and introduces errors with the machines that are available to us to use. We cannot sample the air while it's not flowing, the point of the sample is to see how much and the size of the dust in the air.

Especially in coal mining operations, mines move a tremendous amount of air. It is not uncommon for a coal mine to move more than a million CFM of air at the main fan. To put that in perspective, a typical bathroom fan and a house is somewhere around 200 to 800 CFM and a typical 2,000 square foot house will have an air conditioner fan on it that runs somewhere between 4,000 to 6,000 CFM.

Underground M/NM can be running very significant CFM at their main fan, but because these openings are so large, it can appear underground as if it is stagnant or quiescent flow. To put that in perspective, the average coal mine opening cannot exceed 20 feet wide and 3-8 feet high. In the United States, a 10-foot-high coal seam is very high and very unusual in modern times. At 10 feet of height and 20 feet wide the area is 200 square feet. In stone operations, they can be anywhere from 20 to 80 feet wide in their opening and 20 to 120 feet tall. At 40 feet wide and 60 feet high, the cross-sectional area is 2,400 square feet, or 12 times more than the coal mine. An order of magnitude larger areas inside of stone operations and although they can have a good amount of air going through them, you won't notice it because the cross-sectional area is so much bigger.

It's also important to note that dust isn't only present underground, it is also present in surface mines and it's also present in the plant. When we're talking about dust and dust mitigation, we need to make sure that we are looking beyond just what is going on in underground coal mines and looking at the surface and plant operators.

There has been a lot of research and evaluations of enclosed cabins and clean areas of plants. There are different air intake systems that are available on drill rigs and other places where lots of dust is being generated. We have water trucks in order to reduce dust along hall roads. There has been a lot of work and also a lot of things with the air curtains in the surface operations and plant operations that have dramatically decreased dust exposure outside of the underground environment.

For silica in particular, it's important that the silica risk for a site be evaluated because this risk is going to be site-specific. Rocks in the Earth's crust are not homogeneous, they are not the same everywhere. A particular kind of deposit or mineral mineralogy in one location will have big differences from another. Those differences can be from the way that it was deposited or what rocks are around it. The dust constituency must be present in the rock to be present in the air.

There are a lot of current silica measuring technologies, such as the Field Analysis of Silica Tool (FAST) from NIOSH, which is fast and accurate. They tell you

about the worker's exposure, but it's after the fact. Many of these systems have been developed for specific mineralogy and dust constituencies and should not be universal. Many methods rely on personal dust pumps that are widely available and used in dust sampling for M/NM mines. However, in coal mines the CPDM has mainly been used in place of the pumps.

Several projects, such as NIOSH's Helmet-Cam project, can be used in surface operations and mostly in M/NM operations. The Helmet-Cam monitors what the person is doing and monitors their dust and noise exposure. When the dust is post-processed and contains higher exposure than expected the video can be investigated to determine the source. That project has been popular with several different M/NM operations, but it is not widely used and can't be used underground or in underground coal. It would be much more valuable if it gave real-time data to the worker.

For at least the past 4 years, NIOSH's Broad Agency Announcements have been soliciting proposals to develop something that is similar to the CPDM but for silica dust. That effort has had some promising results and some difficulties. In my understanding of that effort, I think these difficulties can be engineered out, but it will require more than the NIOSH can do with that funding mechanism. I was very involved in the development and deployment of the communication and tracking systems that were required by the MINER Act. That effort was a huge effort for the industry, pulling in many new people and technologies into the coal mines and resulting in some very successful communication and tracking equipment. I think that the difficulties, as I understand them, encountered by NIOSH in the FAST and vendors such as Ring IR and ThermoFisher can be engineered out if they have sufficient funding and backing.

### Automation

I consider automation a means of dust mitigation and reduces dust exposure for workers. Modern mines, right now today are highly automated operations. Most of the mining machines that you see in operation, especially in production operations, resemble robots more than they resemble shovels and picks. These systems have a tremendous amount of data logging on them for maintenance purposes and for efficient use. A major component of efficient use is safe use. Reducing dust improves the life of the machine and even highly automated machines need to be run efficiently. Off-Earth mining operations are projected to be highly automated and will encounter tremendous dust issues. A lot of the lessons learned in terrestrial mines have immediate relevance to NASA's moon missions and any mission to mine asteroids.

We are at a point in the industry, underground, where we have a fleet of highly automatable machines that are being operated by humans. We have reliable communication and tracking information, and that's the opportunity to automate those machines and turn them into remote control or completely autonomous machines. One of the solutions we've discussed is reducing workers' dust exposures to get them away from where the dust is being generated. If you can make all the machines so that they are or they can mostly work by themselves with a human supervising them, then you can put that human into a place where they'll be able to work in a protected environment. They would be more readily able to work in a closed cab or away from where dust is being generated or anywhere. It's not uncommon for a mining machine in Kalgoorlie, Australia, to be operated by a human in Perth.

At the University of Kentucky, my research group has been doing extensive work in automating underground coal mining machines. In our work, we are moving the machine operator from being on the machine to supervising it. The American coal miner's expertise is necessary for the successful conduct of a mining operation. The expertise of America's coal miners is the best in the world, and they are needed to spot issues and keep everyone safe and working together.

In M/NM, the automation constraints are different. They don't have the permissibility issues amongst other things. Also, coal mines are constantly moving the area of the coal mine where the mine face is located. In some mining techniques, you can keep the mine equipment in place for a relatively long time. In a mining technique called block caving, the draw points underneath the block cave will stay there for months. Setting up autonomous pathways underneath the ore body is much more like setting up a factory than setting up a mine. In those cases where you have a fairly static mine opening and so you don't need people working in that area.

You can travel around the world today and visit underground autonomous mines where pretty much nobody is working underground. There's definitely nobody working around the equipment except for during maintenance or if there are any issues. But this is very expensive, and it's really just for particular types of mine methods

and particular types of ore bodies. I don't think that these kinds of completely automated operations will be widely distributed inside of the industry.

I think that more we need to be looking at automation as being a collaboration between humans and the mining machine robot.

### Conclusion

In conclusion, we know that dust is generated at mining operations, and it needs to be managed. Especially if the dust particle size is small and the constituents of the dust are potentially harmful to worker health. We don't have a good model for where the dust will go or how far it will run in the airstream. Especially in the high-flow airstreams that we have in various parts of the minerals industry. Monitoring does exist, but the issue is when it comes to dust, not very much dust monitoring is available in real-time. This is necessary to give the worker the tools they need to make their own decisions about their health.

Dust mitigation technologies exist and are always evolving. No dust mitigation is perfect, especially when we generate a lot of dust at scale. We've worked to reduce the maintenance for dust mitigation technologies because that will keep them running as efficiently as possible for as long as possible.

Using automated machines or more automated machines can reduce exposure to dust, noise, and vibration. But automation can't always be implemented; the skills and knowledge of the mine worker must still be present in the system. Today, most mining machines are customized to their locations, so particular autonomous machines are a lot more expensive because they need additional engineering work before they can be deployed.

### Current Needs

The issues discussed highlight the current needs of the minerals industry. It's clear, and it's been well documented several different ways, that we don't have enough engineers going into the mines. This is the fundamental problem that is shared by industry, academia, and society as a whole. The products of the mines are the basis of the economic activity because it's the beginning of the production chain. Technology developed or adapted to the mines is important to many other industries. The less that we are mining in the United States, the more that we have to transport materials around the world, and the more that material is produced in locations without our environmental, health, and safety standards.

We have the mineral resources and education expertise, but we lack the public will to encourage highly talented engineering students to pursue a career in the mining industry. I meet with the parents and with students to do quite a lot of recruiting into our discipline. I teach an introductory freshman engineering class with approximately 150 students in two sections every fall. What I see in the incoming engineering students is they want to solve the big problems. This is what engineering students do, they want big problems.

They are directed to other engineering disciplines in other industries. A lot of it's because of the rhetoric around the mining industry. The No. 1 question I get from parents of prospective engineering students is, "Will we still have mines in 5 years?" There's a fundamental misunderstanding of the importance of the minerals industry. I think it has been an issue that we, as leaders in society, can address. I've been addressing it by bringing mining technology to other industries.

The mines and their conditions are as difficult and varied as the Earth's crust. That level of challenge is the sort of thing that should be attracting the top engineering talent. We should be saying you're really smart, you need to go work in the mines. There is tremendous opportunity for engineers in the mining industry. Everything in this discussion around the dust problems is rife for engineering solutions. We just need engineers to put existing solutions together in the right way.

In terms of what needs to be done in the future, we need to have more engineers working together on the dust problems. Those engineers need to have a deep understanding of the processes from the mine face to the load out, where customers' materials are loaded, and the particular needs in each of those places. They need to take a risk-based approach to all of the health and safety issues in that area and make tools that match the problem so that we can solve these things as efficiently as possible. Inefficiencies at the beginning of the production chain go all the way through to everyone in society.

The solutions to dust problems in the mines will be direct and immediate solutions in other industries. We are not the only industry that turns big things into

little things and creates dust. Our solutions are the basis for others to learn from because we solve big problems in this industry.

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Senator HICKENLOOPER. Great. And thank all of you again for being here. We really do appreciate it. I am going to be here the whole time, so Senator Kaine, if you want to go ahead and start with questions. Each of us is going to take 5 minutes of questions. I will let it run over a little bit maybe, but I am kind of a hard ass.

[Laughter.]

Senator KAINE. Dr. Harris, you talked about Paul. I have been struck with what Cecil Roberts said that this is happening to younger and younger people.

As I am out in the coalfields of Southwest Virginia meeting with miners at the COMPAC office in Castlewood or others, I am hearing these stories about the silica exposure getting people diagnosed with black lung earlier and earlier. Is that what you are seeing in your clinic as well?

Dr. HARRIS. Definitely. I think still the average age of the person who gets diagnosed with progressive massive fibrosis is older in our clinics from mostly seeing retired former miners.

In the publication we just recently published in JAMA, I think we had 75 miners that were in their 30's or 40's, which is an outrageous number. I mean, it is 75 people that are in the prime of their life that are getting this incurable, potentially fatal disease.

Senator KAINE. What more can we do to promote early detection?

Dr. HARRIS. Yes, I think that is a great question. I alluded a little bit to what other tests we can potentially run for early detection.

I want to, if it is Okay, circle back to talk about CT scans for a little bit. It gets a little bit in the weeds, but I think it is important to know that CT scans are a more sensitive test than X-rays.

We know that through other occupations. In Australia, they have screened thousands of people that are silica exposed, and many of those folks had both X-rays and CTs. X-rays that look normal. The CT are not normal. And so, we are missing things when we just rely on X-rays.

The challenge for us is that we don't have a system like we have for X-rays already set up. So, we have B Readers, which are certified by NIOSH and trained to read these X-rays. We have a classification system called the ILO System for X-rays.

We don't have that for CT scans in the U.S.. Internationally, there is a system that exists for CT scans. It is just not widely utilized. And hardly anyone in the United States is probably trained on it. And so, I don't think we are ready to, from a population level, start with CT scans.

But I do think that since we know who are the highest risk miners, and they are folks working in Central Appalachia, they are folks working underground with the face, that we should think about using CT scans to screen the folks that are highest risk, even if we don't have the perfect tools to understand and categorize it.

We can at least find the nodules. They are easy to see on CT. So that is, I think, my biggest pitch for early detection.

Senator Kaine. I really appreciate that. And now President Roberts in the time that I have been in the Senate, you have gone to bat again and again and again to solve tough problems.

The miner retiree health care plan was on the verge of going bust in 2017. And together with Senator Casey and others, working with the UMW, your UMW members in camouflage shirts pestering us until we got it right, we got that one fixed. And then a couple of years later, it was the retiree pension plan that was on the verge of collapsing.

Again, with great miner advocacy here and your leadership, we got that fixed. And then the excise tax reverted back to an insufficient level that was going to leave the fund even more challenged, and we were able to work together to get that fixed.

But every time you knock one down, there is another one staring you in the face. I am happy about this silica standard. I know Senator Casey and others really leaned hard on the Administration to issue it.

A standard is great if it is implemented. What advice do you have to us now that the standard is in place about what we ought to be doing as Congress to make sure that this standard gets implemented?

Mr. Roberts. Well, I was pleased to—sorry. I was pleased to go to Pennsylvania with the Secretary of Labor and the Assistant Secretary for MSHA to announce this rule.

I think the key here, it is a rule. I think it should be the law because if we have a change in leadership at MSHA or the Secretary of Labor, we might see this rule changed and we will be right back where we were before the rule was promulgated. So, I would urge consideration with respect to that.

If it is a good rule, it should be a good law, because this is something that is going to take silica out of the atmosphere. I fully support what the medical professionals have said about silica and testing for it, Okay—black lung testing for it.

But there is nothing like eliminating the problem, so you don't get sick. I hope the X-ray people—and they can't find a single person in this country suffering from this disease. That is what our goal should be here in the U.S. Congress and in our union also. Because if you don't take the silica out of the atmosphere, I don't see how we are going to save people's lives.

We might catch this early, but here is our problem. The coal industry has been shrinking. Young miners can't find jobs in any other professions. So, one of the things that I would advocate for is bringing some good paying union jobs to these areas, so people don't have to depend on mining. I am a strong advocate for this—mining as much coal as we can.

I have been very open about that and provide as many jobs as possible. But one of the things that happens, a young man with children will give up his health in order to support that family. What we need to do is make that job he has in the mine safe and

healthy, and also find other places of employment in these coalfield communities.

Everywhere I go—I am sorry, I am getting long winded here, but everywhere I go somebody tells me, we want to address the transition for you guys, but I never see it. I certainly don't see enough of it.

What we need to do is find a way, in my opinion, to mine coal cleanly and safely, and help and people be healthy when they come home every night.

Senator KAINÉ. I was in Tazewell County this weekend down near the Pocahontas area where there have been one massive tragedy after the next over the course of history.

I was hearing the same message from folks, mine coal safely. Help us diversify and find other opportunities. And I am so glad that you mention that. I yield back, Mr. Chairman.

Senator HICKENLOOPER. Thank you.

Senator Braun.

Senator BRAUN. Thank you, Mr. Chairman. I had some questions prepared but I always listen to the witnesses and try to discern what the meat of this whole conversation ought to be about.

I know in my own company many years ago, when you try to take care of your employees, and that ounce of prevention being worth a pound of cure. In this case, it sounds like it would be even more than a pound of cure that you would save. Coal mining has been around for so long.

I want to ask Mr. Roberts some simple questions. First, and keep the answers fairly brief, because I think you can, with your experience, tell me this. Is this an issue only in underground mining, or is an issue on strip mining above ground as well?

Mr. ROBERTS. It is found primarily in underground mining. Just quickly, most of the easy coal, as they say back home, has been mined.

Senator BRAUN. You got to go underground—

Mr. ROBERTS. Coal seams are shrinking—so you are banning coal in a place about the height of this table. You can't do that without taking a rock. When you start taking a rock so you can mine, this coal, that is where you get to silica.

Senator BRAUN. You get that same type of dust floating around in the air if it is above ground versus being underground. So, it—do you get it in both methods?

Mr. ROBERTS. When you do surface mining, it has been my experience and based on the knowledge that I have, is you don't get the same amount of coal dust, nor do you get to rock silica above ground.

Senator BRAUN. Then when it comes to silica versus regular coal dust, is that confined just to that triangle down in Appalachia or do you have that elsewhere?

Mr. ROBERTS. This would be like saying, where did the disease breakout? And the disease in this instance is in that geographic area. You could take it probably a 70 mile radius there and you could identify where most of these cases are.

It is not to say that this couldn't happen, say, in Northern West Virginia or in Pennsylvania, but the likelihood of that is very remote because they are not mining to rock as they mine to coal in those areas. They don't have—

Senator BRAUN. It depends on the geology of where you are mining.

Mr. ROBERTS. Pretty much, yes.

Senator BRAUN. Okay. And then on something as clear as silica versus coal dust, and one happening at an earlier age, it seems like just taking and focusing on where the issue is or where it is most dramatic, what has been done by Government and companies to focus on something where it is surfacing so much earlier in coal miners? What has been done?

Mr. ROBERTS. Let me give you an example of my frustrations, if I might. I looked at my testimony. I have been doing this for years here. The first time we talked about needing to do something about black lung and in mentioning silica was in 2003.

20,000 miners have died from black lung since I gave their testimony. So, we haven't done much of anything. We didn't even have a rule about silica until a few weeks ago. So, to answer, there is not a lot.

Senator BRAUN. Next questions will be for Dr. Harris and Schafrik. When it comes to individual miners, do all seem to be affected in the same way, or does it vary by miner? In other words, if you are in a mine that has got poor ventilation and doesn't do anything about it, is everyone there generally going to come up with some issue, or is it different among miners?

Dr. HARRIS. I think it is a complicated answer. It depends. I think, I have miners who have mined for four decades in low coal underground and never got black lung. And so, it sort of depends on what your body does to the dust it inhales.

You have an immune system that can kick out dust more effectively in some people than others. I think it is—I don't think we know enough to say who individually is at risk, but we do know of risk factors of where they are working and what kind of coal they are mining, and what their specific job tasks are.

The closer you are to the seams, the more rock you are mining, the more dust exposure cumulatively over time, the higher risk you are. But I don't think individual risk factors, we have totally sorted out yet.

Senator BRAUN. Dr. Schafrik.

Mr. SCHAFRIK. Yes, Senator. I am an engineering, mining engineer, so I will yield to the medical discussion of that.

But I would also agree that it would most likely have a lot to do with what their specific job was, what they were doing, how much rock was being cut at the time that they were working downwind from it, and what dust mitigation technologies of the many that are available were being deployed at that site, and if that site decided that they needed those or was told that they need those.

There is a huge number of variables here to be able to answer that question fully, so I would be more than happy to answer it in

more detail for you if you had some like specific case that you were looking for.

Senator BRAUN. My simple observation would be, since there is variability among miners and Mr. Roberts said it is inherently kind of dangerous in some places, is that early detection would seem to be the only way that you can kind of in a fairly simple, broad way make sure you are getting at it before it becomes incurable. So, I think that is where a lot of attention and focus would need to be placed.

Mr. ROBERTS. Right. I don't—I wouldn't disagree with that, but I would point out that if you are mining rock along with the coal, you are creating coal dust and you are creating rock dust. And that rock dust mixed with the coal dust is deadly.

Senator BRAUN. That would be the best prevention, is to make sure you filter that all out in the first place.

Mr. ROBERTS. If you could. But I would just point out there has quite frankly not been a great deal of effort put into that until the silica rule was promulgated. That is the only step that I have seen in the many years that we have been raising this here in Congress.

Senator BRAUN. Thank you.

Senator HICKENLOOPER. Yes. And as the probably one of the only former geologists in the room, it is interesting if you look at the sedimentary environments by which rock, sedimentary rocks get created.

You generally have shoreline features that have milk—clay and sandstone, silica coming down, little critical particles of quartz that becomes—that is sand. And then it gets mixed into embayment where you have lots of lagoons and swamps. We have a lot of carbon the leaves from trees and all that comes in and that becomes coal.

Then the clay and the sand has different—they kind of feather into each other. And in certain places where it is dropping rapidly, you get huge, thick packages of coal. Other places you get beaches.

You can see deserts or, become sort of big, thick packages of rock. What is critical here is the fact that where miners can make money best is where you have those thick packages of what becomes coal or that organic material and not much of the silica. But there has always some silica in there.

In other words, there is an inner fingering of the grains. I think what Dr. Harris was describing was the—or actually, I think Mr. Roberts was describing that the easy stuff is gone and so now you are getting thinner packages of the coal itself. And even that coal that you get is going to have some silica in it.

It is obviously a problem that is not going to get—go away. It is not going to get better.

Senator Casey.

Senator CASEY. Mr. Chairman, thanks so much and I appreciate you having this hearing along with the Ranking Member. I want to welcome and thank our guests for their testimony and the experience they bring to bear on these subjects.

In particular, I want to thank President Roberts for his work, his toil, and, dare I say, sweat on behalf of miners, coal miners all these years. I wanted to start just with a little background. I grew up and still live in Scranton, Pennsylvania, which for a while was the anthracite capital of the world, or pretty close to it, so-called hard coal.

For a while there, virtually every family had a coal miner or more than one, generation after generation. I have had, since my family emigrated from Ireland, one, two, three—three generations of coal miners.

Then the fourth generation was my grandfather, Alphonsus L. Casey—I wanted to just say his name in the hearing record. He was a coal miner as a kid, really, from the age of 11 to 15—15 or 16, about 5 years from 1905 to 1910.

He was in the mines right around the time that Stephen Crane, the great novelist of the *Red Badge of Courage*. He was dead at the age of 28 but he wrote an essay about a miner near Scranton, and he described it in the most haunting and horrific way that only a coal miner would understand.

At one point, Crane wrote in the essay that before him stretched and inscrutable darkness, a soundless place of tangible loneliness. Then he went on to describe all the ways someone could die in a mine. So, it is a haunting portrayal, but obviously accurate for the late—I guess around the 1890's when he wrote it.

Obviously we have made some good progress over the generations since then, but this problem is still with us, the black lung and the horrors that some families have experienced, some miners have.

Dr. Harris, I was noting in your testimony about the reality here of what this means. The debilitating nature of these cases and how painful they are when someone is experiencing black lung.

In your experience, do miners with the most serious black lung disease always get the benefits they have earned? That is kind of part one of the question. And part two is, what stands in their way?

Dr. HARRIS. Thanks for that question. The short answer is no, they don't always get the benefits they deserve. And I think it is important to understand how long and painful the process is for the miners.

I mean, the average case takes years to resolve and the layers of appeal that happens goes on and on. From the Department of Labor to the administrative law judge, to the Benefits Review Board, to the District Court, it just goes on and on and on, and it is super frustrating for people.

I think the biggest reason like claims are disputed is whether or not complicated disease, whether or not progressive massive fibrosis is present or not, which is usually one X-ray opinion versus another X-ray opinion. And so, I think an important way to improve that process is to utilize CT scans.

Inside the Black Lung Benefits Improvement Act, it specifies if someone's X-ray is abnormal, we should be using CT scans. And I think that would help tremendously to improve the process. It is

not going to help every miner. And I could name a million examples—not a million.

I can name many examples of miners that I have cared for that have really horrible, horrendously severe disease—category B progressive massive fibrosis. Last week, I was working on a case and his case has gone on for 5 years. He has a mass that is five centimeters in his lung.

It is not subtle, and it has still taken 5 years to resolve. And I think it eventually will resolve in his favor because the evidence is indisputable, but it has taken a really long time and so there are lots of challenges.

Senator CASEY. I think there are a few diseases where literally every breath you take, you can feel it. And obviously, one of the many reasons why we have to pass the Black Lung Benefits Improvement Act and to close loopholes—if we pass that law, to close loopholes and order courts to award benefits.

I wanted to conclude, and maybe I will submit this for the record, but President Roberts, you talked about the silica rule, and we are grateful for that, for the work on that. And maybe I will just—I don't know if we have time for a question or—what is the most important thing we could do here in the Senate and in the House to ensure the coal miners affected by black lung disease can easily access the disability benefits to which they are entitled?

Mr. ROBERTS. Well, first of all, the system is grossly unfair. And what the doctor said here has been our experience too. And I think you should take a look at some of the things that has happened along the way here.

We have had attorneys that withheld evidence that miners had pneumoconiosis, and they did not inform the opposing attorney that they had that. Those people have been sanctioned.

Then just go over to Johns Hopkins Hospital episode. I think CBS did a story on this. They had a doctor there that was well known that never, one time in his career found pneumoconiosis in a miner's lungs.

Every time that he made a decision like that, the miner did not get their benefits. So, there has got to be some way to level the playing field. I would suggest just ask any attorney in the coal fields if they want to be a black lung attorney and see what they tell you. They can't afford to be a black lung attorney.

Workers who are sick found themselves without representation or depending on a law attorney that just wants to be helpful to society—and there are some of those out there. And I know that. But if you want to make a living as an attorney, you don't want to be doing this.

We have got to figure out how we balance the playing field here. But the most important thing we could do is not have anybody else contract black lung. And if you think that can't be done, that is not true.

We have heard for years that you couldn't make coal mines safe, but we proved with the law that was passed in 1969 that you could. Just look at the statistics of the 20 years, 10 years, 30 years,

or 40 years before the law passed and see what has happened to 40 years afterwards.

There are people walking around alive today that would have been dead in 1970 if they didn't have this law to fall back on. So, laws work, but you got to have laws that are enforced, and people have to want to make those mines safer.

Let's just not have any more black lung cases. And we—Congress has the power and ability to do that. That is a fact.

Senator CASEY. Thank you.

Senator HICKENLOOPER. Senator Luján.

Senator LUJÁN. Thank you, Mr. Chairman. And thank you very much for having this important hearing.

I very much appreciate in your opening remarks the inclusion of your statement with the Radiation Exposure Compensation Act as well. Thank you very much for that. To all of our panelists, I want to thank you for being here today.

As I begin, I want to be abundantly clear that I am fully supportive of working with my colleagues to improve all of the environment associated with exposure to uranium—or pardon me, to coal mine workers. There must be more that we can do, whether it is adoption of technology, it is looking to make sure people have those that can best represent them given all that is going on.

Families deserve to heal for those that are still fighting cancer. Now, what I want to use my time today is to bring some attention to uranium mine workers as well.

New Mexico uranium mine workers who work beyond 1971 have faced a huge injustice. They have no access to any programs in the United States, even though Congress took action with the leadership of Orrin Hatch once upon a time to provide protection to uranium mine workers through 1971.

The Radiation Exposure Compensation Act, enacted in 1990, expanded in 2000, left outpost-71 uranium mine workers in New Mexico, Colorado, Arizona, Wyoming, North Dakota, South Dakota, Washington, Utah, Idaho, Oregon, and Texas.

Due to their work and exposure to radioactive uranium in the name of national security, mine workers are now struggling and dying of lung cancer, lung and pulmonary fibrosis, and other conditions.

The U.S. Government has left them to fend for themselves. It created the uranium mining industry, but when the Government stopped being the sole purchaser of uranium ore after 1971, it left workers excluded from RECA even though they were working alongside eligible workers.

Now, Dr. Harris, yes or no, is uranium ore exposure in 1971 associated with lung cancer, lung and pulmonary fibrosis, silicosis, pneumoconiosis, and renal cancer?

Dr. HARRIS. Yes.

Senator LUJÁN. Is uranium ore exposure in 1972 associated with lung cancer, lung and pulmonary fibrosis, silicosis, pneumoconiosis—I pronounced it incorrectly—and renal cancer?

Dr. HARRIS. Yes. And I will—I can tell you that because Dr. Akshay Sood, who is one of my mentors, did a study to answer that question and looked specifically at lung disease before and after December 31st, 1971, and found there is still exceedingly high amounts of chronic lung disease after the 1972 cutoff, which is a bit arbitrary.

Senator LUJÁN. Is that consistent in 1990?

Dr. HARRIS. Yes, I don't know any data to suggest that anything has improved dramatically in that time period.

Senator LUJÁN. To my colleagues, even though we have the evidence, RECA excluded those who were exposed after 1971 and experiencing the ever deepening damage of Government sanctioned uranium mining.

Ciprano Lucero, who is from Grants, New Mexico, he began working in the uranium mines back in April of 1977. Now, this is a quote from Mr. Lucero. He said, "the lunchroom where we ate, lunch was covered in a fine layer of the yellowcake as well, as that was the only place we had to sit and eat.

No matter how many times we wiped it down, the table and chairs were always covered in the fine yellowcake." That is the place that they designated for them to have a bite, which was supposed to be one of the cleaner places.

He suffered from pulmonary fibrosis, sleep apnea, high blood pressure, cognitive heart failure, kidney failure, arthritis, and diabetes. He sadly died in 2020 at the age of 66. Now, Mr. Lucero died without his sacrifice recognized or compensated by the U.S. Government. I have endless stories of constituents, not just from New Mexico, from—through different parts of America and I certainly hope that we can find a way to take action.

To every one of my colleagues in the U.S. Senate that voted yes to advance the Radiation Exposure Compensation Act amendments to be part of the NDAA, and those of you who voted yes to advance it as a standalone bill working with Senator Josh Hawley, where we had 69 Senators show up and say, yes, we can do better, it is now before the U.S. House of Representatives.

This program expires on June 7th of this year. All we need is a vote from Speaker Johnson. I am confident that we have the votes to get this done there, and I just appreciate my colleagues giving me another opportunity to raise this issue.

Now, to this hearing, Mr. Chairman, you can count on my support to stand side by side with colleagues who are fighting on behalf of uranium, of coal mine workers and their families, and to make all of these environments safer.

I look forward to learning more from families all across America and through New Mexico to make sure I am doing my part. And I continually pray for your health and for your wellness, and I hope that you will consider lifting your prayers up as well for those families that we are fighting for within the Radiation Exposure Compensation Act as well.

Thank you, Mr. Chairman.

Senator HICKENLOOPER. Thank you, Senator Luján.

Why don't I let you ask your question and then I will ask my questions.

Senator BRAUN. I think it has been a good conversation in terms of understanding what we are up against, and I want to ask this of Ms. Brown Barnes.

When it comes to the entity that financially should be in good shape to handle this, and we are in an industry where we know it has taken a lot of heat for many other reasons and it has put it in financial distress, how does this all work itself out, in your opinion, in the long run when you have a trust fund that is being underfunded and you got liabilities that are increasing.

How does that all work out, and at what point would potential future liabilities make it impossible to dig out of the hole we are in?

Ms. BARNES. Well, it isn't likely one solution. Congress could forgive some of the interest in the debt in terms of the borrowing that has been going on since 1979. There is also the coal tax.

But one thing that the Department of Labor has projected is the coal tax is enough, at least for this Fiscal Year, to be able to meet the benefit liabilities, as well as the administrative costs of administering the program, but it is the debt servicing cost part of it that is—that is still something that needs to be worked out.

In terms of overseeing a program, the Department of Labor itself has to have some sustained focus and leadership attention to looking at this, to overseeing the coal mine operators, especially with regard to self-insurance and making sure that they have the necessary collateral to be able to cover not just the current benefits, but also the future benefits.

Senator BRAUN. When you describe the fact that the debt service is overwhelming, of course, that comes from running annual deficits—it is a cumulative result of that. Our own Federal Government is doing that now to the tune of almost \$0.30 on every \$1.00 we spend. I am on the Budget Committee.

You talk about a distressing subject. Being there, and we are trying to figure out what to do there to make this place fund itself better. And this is the backstop for this trust fund. So, there is a lot there that looks like is in peril.

One of those annual deficits been as a percentage of what it should be to actually avoid the deficits in the first place? In other words, how much are we missing the mark on the average, say, percentage wise?

Did we start this back in 1979 when it was annually—running deficits to where it wasn't funding—we weren't paying enough into the fund to pay the benefits?

Ms. BARNES. It did start back in 1979 when we were doing the borrowing from the Treasury, from the actual General Fund—

Senator BRAUN. That is when you had the shortfall. And has it been every year since then?

Ms. BARNES. It has been just about every year Congress did forgive some debt in 2008. It was about \$6.5 billion. That did help

some. The coal tax has had some decreases and increases. And so, that has changed over the years as well.

Senator BRAUN. That is likely to be less. Just looking at where the country is going in general. So, what is the total debt currently held by the Disability Trust Fund?

Ms. BARNES. Well, I know, in terms of at least speaking to the borrowings, in 2023, there was a \$2.7 billion that had to be borrowed that totaled—

Senator BRAUN. That was an annual deficit that year?

Ms. BARNES. That was how much they had to borrow to even cover all of the expenses, including the benefit payments and administrative costs.

Senator BRAUN. Mr. Roberts.

Mr. ROBERTS. It is \$6.4 billion.

Senator BRAUN. In total, the debt—?

Mr. ROBERTS. Yes, in total. I think so, yes—

Senator BRAUN. Okay. So, it looks like, with an industry that is shrinking and maybe now new liabilities that are arising, it has no way to currently pay for the benefits that need to come from it. And the Federal Government is borrowing \$0.30 on every dollar.

We have got a predicament there and it is probably an issue more broad than just this conversation. So, that ought to make us all take pause on what we do to eventually solve this problem.

Senator HICKENLOOPER. Rather sober—the entire discussion is rather sober. Dr. Schafrik, the U.S. is on track to create thousands of new mining jobs in the future. There will be millions of new mining jobs worldwide as we transition to different energy systems, more electric vehicles.

This great transition is going to move in various directions, but they are all going to require more materials, and we need to respond to health and safety best practices that are responsive to this growth.

As we work to explore best practices, what lessons do you think we can learn from our international partners? I know Australia is a good example, but what is someplace that we can—make sure that we our mines are as safe as they possibly can be?

Mr. SCHAFRIK. Yes, Senator, thank you. One of the issues that we have in the United States is that we have several different regulatory environments around workers. And MSHA has their own set of regulations and OSHA has their set.

Now, this makes sense from a variety of points of view, but it does cause issues when we are trying to both export and import safety technology into the United States because a technology—and we experience this quite a bit in the communication tracking field. Technology that was perfectly acceptable in say Europe, or in Australia, was not acceptable for use in the United States.

Now, a lot of these get into details very, very quickly. So, I would just, suffice it to say, for the higher level view is that I think that we need to do a look at a lot of the regulatory procedures. And I know that MSHA is not necessarily happy with those either.

I think that we should look at these things and in the detail and in particular sections of the regulations and say, where are we building an impediment where we should be building an incentive.

Senator HICKENLOOPER. Yes. Yes, thank you. I think that is true. Ms. Brown Barnes, you contributed to a number of studies about the Federal benefits program. What lessons do you learn from our history in administering the black lung benefits program that we can apply to other existing or future workers compensation programs?

Ms. BARNES. Some of the key practices or leading principles that we use when we are looking at other benefit programs is the leadership focus and sustained attention on managing the program. We also look at goals and performance, outcomes, and having some key measures. It is also important to take a look at the data.

Have some reliable data that you are analyzing and some hard evidence there. We also look at the involvement of the key stakeholders, the employees, those who are having those experiences that you can talk to and learn from as well, just to name a few of the practices.

Senator HICKENLOOPER. All right, I appreciate that. Thank you. President Roberts, you have obviously had a long history in the mining industry, not just as a miner yourself, but as someone who has been supporting miners and making sure they get the benefits and the health care that they need and deserve.

You have seen firsthand the benefits of previous mining health and safety improvements—the 2009 dust rule that everyone has referred to. And you have in many ways been at the helm of addressing the efforts to pass remediation for black lung, to make sure that the black lung benefits, Improvement Act delivers.

How would you approach—and again, we are going to need miners, not just in coal but in all different levels. How would you approach encouraging a new generation of miners to join the workforce, and how do we best support them?

Mr. ROBERTS. I don't believe that, at least at this time, that we have a shortage of people willing to work in mining, particularly if it is not coal mining.

We have people who are applying every day to be in a coal mine, right. So, we know that people are hungry for employment. And quite frankly, a coal miner working under UMW contract can easily make \$100,000 a year.

If we make those jobs safer and healthier, then we will have plenty of people wanting those jobs. But I think we are talking about the future here of different kinds of mining. I think what we need to do is the opposite of what we did with respect to coal mining.

We never worried—when I say we, I am talking about the Government itself and all of us part of the Government one way or the other, we never worried about, we need safety laws here, we need laws to protect people's health, we need laws to protect them from being killed, covered up, blown up, burn up, and all that happens and has happened in the coal industry.

We need to look at that in the beginning, not at the end, in which we seem to be doing with respect to coal mining.

Senator HICKENLOOPER. Right. Well, that is a good point. Dr. Harris, in Colorado, we have got a long history of not just coal mining but uranium mining as well. We are the proud home to the hospital, National Jewish Health, which is the only HRSA funded black lung clinic in our state, and it also does radiation screening for former uranium miners.

As you have described, accessing timely screenings is a vital part of disease prevention and management, and helps miners, a, get the support they need quickly, but also, it improves their eligibility for black lung benefits.

What would you say or what would you describe as specific steps that we should take to make sure that timely information and medical services can reach miners across the nation?

Dr. HARRIS. I think mining often happens in rural communities, and accessing rural communities is challenging in general. And I think the key is having local, regional people that are experts.

I think for industries like uranium, there are very few people who are experts in how to take care of someone with uranium issues related—that cause health issues. Similar for black lung.

I did my fellowship training in Connecticut and never once saw a coal miner until I moved to Virginia. And so, a lot of this is regional problems and we have to come up with ways to have regional solutions.

I think the RECA clinics that do the uranium screening should be expanded. And there is—they are going to get cutoff when the RECA benefits expire because those are who are eligible to be seen in those RECA clinics.

I think building on the expertise that already exists for those clinics is critical. And I also think coming up with more innovative ways to bring care to rural areas is important. And so, we can learn from programs like the Co-Worker's Health Surveillance Program, which has a mobile unit that does mobile X-rays and mobile screening.

There is a program like that at the University of New Mexico. I think having—we have the technology to do these things. And to be able to take digital X-rays and to bring the care locally to people.

The last point I will make is I work in Central Appalachia. It is really hard to recruit doctors there. It is just hard. And most of our new hires for providers are nurse practitioners or physician assistants.

I think those folks are often coming from the communities where they are serving. And to build some expertise into the nurse practitioner. PA capacity locally is going to be key for the future.

Senator HICKENLOOPER. Good points, each one of them. Appreciate that. I don't know if anybody has anything left unsaid that is boiling over, before I close the hearing. I suspected Mr. Roberts might have a comment.

Mr. ROBERTS. This would be just one quick point. We have focused on the most severe cases of pneumoconiosis here, but we should not leave here thinking that coal dust doesn't kill coal miners.

It just takes a longer time for a miner to die. And once again, the ability to receive benefits in this program is so unjustly—it is not administered unjustly. It is just unfair because a coal miner who is sick and can't work is trying to get benefits against an attorney just making \$400,000 a year.

They have access to doctors from all over the United States, and that coal miner doesn't have that. It is not a level playing field, folks.

Senator HICKENLOOPER. Yes. Dr. Schafrik, are you going to say something?

Mr. SCHAFRIK. Yes, Senator. I just wanted to point out that—because it hasn't—it is an important thing to keep in mind with the new silica rule is that it applies to all miners. That is not an underground coal, surface coal, coal only.

That is all miners. And there are miners everywhere in the United States. And the vast majority of mines in the United States are surface mines. The vast majority of mines in the United States are not coal mines.

When we are considering a lot of these issues, I think that we need to consider that it does impact the industry as a whole. It doesn't just impact the underground coal miner.

Senator HICKENLOOPER. I couldn't agree more. And I think that is a longer discussion even as we look at how many smaller mines there are and how difficult is to get their not just efficiency, but their health, safety, and precautionary methods in place. Thank you all for not just being here, but for your service in your lifetimes.

One of the saddest songs I know is called Dark as a Dungeon, where it says—the end of the song says, where the rain never falls, and the sun never shines. Where it is dark as a dungeon, way down in the mine.

It is a challenge that I think we all share, and I think that we can successfully address. But it is going to take persistence and commitment from us in the Senate. But again, appreciate all the commitment that you guys have displayed. That is going to end our hearing today.

I would like to thank each of the Senators who came and joined us. I would like to recognize and thank my Vice Chair, Senator Braun, for his efforts. We thank each of our witnesses, Ms. Brown Barnes, Dr. Harris, Mr. Roberts, Dr. Schafrik, for your participation.

For any other Senators who couldn't get here watching from their office, if any Senator wants to ask a question or an additional question, questions for the record will be due in 10 business days, June 5th at 5.00 p.m. The Committee now stands adjourned.

# **Attachment 1**

Cecil E. Roberts, President  
United Mine Workers of America  
Testimony before the  
House Committee on Education and Labor on  
H.R. 5663; MINER SAFETY & HEALTH ACT OF 2010  
Tuesday, July 13, 2010  
Hearing Room 2175  
Rayburn House Office Building  
Washington, D.C.

Thank you for inviting me to address the Education and Labor Committee about this important legislation. As President of the United Mine Workers of America ("UMWA"), I represent the union that has been an unwavering advocate for miners' health and safety for 120 years. I am pleased to have this opportunity to speak in support of H.R. 5663. It addresses some very serious problems that have been highlighted this year in the coal industry as well as other industries.

This Committee plays a significant role in advancing miners' health and safety. We are deeply appreciative of the leadership you have shown in trying to protect and enhance the health and safety of all miners. Your continued oversight is essential. We share with you the common goal of wanting to ensure that all miners will go home safely and in good health after the workers' shifts each and every day.

This Committee knows all too well that the status quo is inadequate; this year 40 coal miners have died at work -- and we are barely half way through the year! The horrific Upper Big Branch disaster claimed 29 underground coal miners. But eleven other coal miners also died - one or two at a time. We can and must do a better job of protecting our nation's miners.

I have testified before this Committee as well as before Senate Committees about some of the shortcomings in the existing laws and about problems MSHA confronts in enforcing the law. H.R. 5663 addresses many of the issues we have been discussing. I will review some of the current problems that demand attention,

then speak about how the proposed legislation will address those problems; and I will make a few suggestions to further improve the proposed legislation.

A fundamental problem MSHA confronts is how to deal with operators that habitually violate the law. Voicing her apparent frustration on this very point after

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yet another miner died, on July 1 Secretary of Labor Hilda Solis issued a press release in which she stated:

...31 of the 40 coal mine fatalities that have occurred in 2010 have occurred at Massey mines. We have issued citations, closure orders, stop orders, and fines to get Massey to take its safety responsibility seriously. Earlier today, the U.S. Attorney in the Southern District of West Virginia announced four Massey supervisors will be charged criminally stemming from a MSHA and FBI investigation into the deaths of two miners at a Massey mine in 2006. But yet again, today we mourn the tragic loss of another miner whose safety was entrusted to Massey Energy (emphasis added.)

Clearly, the status quo isn't good enough. MSHA's efforts have failed to motivate at least some mine operators, like Massey, to do what is necessary to operate their mines safely each and every day. We know many operators are performing much better. In fact, of the 40 coal fatalities in 2010, not one was at a union operation.

Even before the Upper Big Branch disaster in April, we met here to discuss how the huge and growing backlog at the Federal Mine Safety and Health Review Commission ("FMSHRC") was undermining miners' health and safety. While more Administrative Law Judges have been hired to deal with FMSHRC cases since I testified in February, there remains the problem of operators routinely challenging MSHA citations in an effort to delay resolution of their outstanding citations and orders -- whether to delay paying the penalties or to avoid the enhanced fines that attach to repeat violations, or to escape the challenging Pattern of Violation enforcement tool MSHA has threatened to use. And though Congress increased fines when it passed the MINER Act of 2006, because citations and orders are being regularly challenged, that new fine structure has not served to induce better compliance.

After a citation is fully litigated and there remains no further issue about an operator's obligation to pay a particular penalty, as it stands today a mine with unpaid fines can continue its production notwithstanding a lengthy delinquency. We understand that there is more than \$27 million in unpaid fines resulting from MSHA final orders! One way to avoid any such delinquencies would be to require all assessed fines to be placed into an escrow account, as we have previously suggested.

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Consistent with the expectation that all fines shall be paid close in time to the violation, the proposed legislation provides that when due process procedures have been exhausted, the operator must promptly pay its fines. And while MSHA has claimed uncertainty about its authority to take action against an operator with delinquent fines, the legislation will give MSHA the ability to temporarily close a mine if fines are not paid within 180 days. We think that's fair: operators that work within the legal framework shouldn't have to compete against those who flaunt the system.

MSHA also has been uncertain about its authority to take immediate action to shut down a mine when it observes violations the Agency believes place miners' health and safety at immediate risk. The proposed legislation addresses this by granting MSHA the authority to seek injunctive relief when it believes the operation is pursuing a course of conduct that jeopardizes miners' safety or health.

This is sorely needed.

Another shortcoming with the existing framework concerns the criminal penalties in the Mine Act. They have been insufficient to coerce the compliance we need. First, the criminal sanctions only amount to misdemeanors -- a virtual slap on the wrist -- even though the consequences for Mine Act violations can be deadly. We know it can be difficult for a government agency to convince a prosecutor to pursue a case for Mine Act misdemeanors. This means that some who could have been prosecuted under the applicable legal standards likely escaped criminal prosecution simply because the criminal sanctions now available to prosecutors are too mild.

More importantly, the top-level people who create and maintain the corporate policies that put company profits ahead of workers' safety have been permitted to remain in power and to continue their misguided practices while their subordinates have to take the blame, including any criminal liability. We believe

that CEOs and corporate Boards of Directors should be held accountable; they should have to take responsibility when systemic health and safety problems are evident within a company. H.R. 5663 would provide these changes: it imposes criminal penalties for "knowingly" taking actions that directly or indirectly hurt workers, and makes a felony any such conduct, with jail time increased from a one year maximum to five year maximum for a first offense and ten years for a second offense, and the fines increased from a maximum of \$250,000 to \$1 million, or \$2 million for a second offense. It also makes it easier to prosecute corporate representatives who knowingly authorize, order, or carry out policies or practices that contribute to safety and health violations. We fully support these

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improvements to the criminal penalties.

Even though the existing law requires MSHA inspections to occur unannounced, we have all heard stories about the many ways operators game the system so inspectors will not discover unsafe work practices or conditions. When this Committee visited Beckley for its hearing with Upper Big Branch families, you heard reports about the various signals and codes that were relayed underground (such as, "we've got a man on the property" from Gary Quarles testimony on 5.24.10) before the inspectors could arrive on a section, allowing managers to direct make-shift changes to avoid getting cited. And when MSHA took over the communication stations upon arrival at a couple of operations in Kentucky during recent blitz inspections, MSHA inspectors discovered many more violations than had previously been discovered - violations that likely would have been covered-up and gone undetected if the special warning codes were allowed to continue. To deal with these issues, the proposed legislation increases the criminal penalties for those who give notice, and requires information about the criminal penalties to be posted at mines so all miners will be on notice that giving any kind of notice about an MSHA inspection is improper and constitutes a very serious violation of the Act.

There has been a lot of discussion about the Pattern of Violation ("POV") tool that MSHA has long had a right to use, but which has not been effectively utilized. MSHA has alerted some operators about their being vulnerable to being put into a Pattern and this has generally been successful in accomplishing some short-term improvements. This happens because being put onto a POV is properly perceived as being a dramatic event that would be hard to ever escape. However, MSHA has been both too hard and too easy in its prior use of the POV. It is too hard insofar as if any mine would actually be placed into a POV (as opposed to just getting a warning notice about the possibility), under the current scheme it would be nearly impossible for the mine to ever again operate; once the POV attaches miners must be withdrawn if MSHA finds any S&S violation. But even the most-attentive operator may not be able to avoid all violations all the time.

For example, barometric pressure changes can quickly give rise to an S&S violation.

MSHA's current POV protocol is also too easy insofar as after MSHA issues a POV warning notice the Agency only requires a 30% reduction in the short run for an operator to be relieved of the extra scrutiny. It is too easy for an operator to demonstrate short-term improvements without making the wholesale changes needed to render the mine safe on a long-term basis. The focus of a POV program should be to capture the attention of management and miners alike to affect a

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wholesale cultural change -- to make everyone at the unusually hazardous operation aware of what may be comprehensive problems, and to make sure they learn and practice different and safer work practices. The improvements should be fully integrated so the mine operates more safely going forward on a long-term basis, not just long enough to get the mine off MSHA's watch list.

Rather than the punitive POV model now in place, the legislation seeks to turn the POV into a rehabilitation program. It provides for MSHA to tailor any remediation to the particular operation: if MSHA determines that more training would be helpful, it could require that; if the mine would benefit from a comprehensive health and safety program, the Agency could mandate that one be designed and implemented. The legislation also mandates a doubling of the inspections while the operation remains in POV status, as well as a doubling of the fines after 180 days if adequate improvements are not accomplished. An operation would remain in POV status for at least one year, which should be long enough to ensure that the new practices are actually working. Finally, MSHA plans to measure a mine's success against objective benchmarks, properly comparing any operation to other mines of similar kind and size.

The proposal also would provide more immediacy in MSHA's assessment of an operation: MSHA would evaluate a mine's safety record for POV purposes based on contemporaneous citations and orders MSHA inspectors would be writing, rather than measuring a mine's safety record based on final orders that now can take years to process. Because contested citations are now caught up in a very long backlog at the FMSHRC, by using only final orders for POV purposes (as MSHA now does) the Agency could be placing a mine on a POV in 2010 based on its unsafe conduct from 2008, because it could take that long for the underlying orders to become final. From a safety management point of view this doesn't make sense. A mine with poor safety practices in 2008 should be placed in the POV status in 2008 -- when the added scrutiny is most needed, not years later when the various legal challenges get resolved. Likewise, if management at an operation with numerous S&S citations and withdrawal orders in 2008 recognized

dangerous mining practices, and about problems with equipment. If reports are not provided when all accidents occur, the same problems are more likely to recur. There is no place for subjectivity; rather, all accidents and injuries should be reported so the mining community can learn from our collective experiences. Top level mine management should also be required to sign off on the reports -- both to ensure that the personnel with the power to make changes (when needed) actually know about the accidents at an operation, and to provide much-needed accountability.

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A strength of the proposed legislation concerns the entities from which MSHA would receive and maintain accident and injury data. As it stands today, MSHA reports do not relate the health and safety records of an operator's contractors to the operator itself. Yet, if an operator would be required to take more responsibility for those working on its property, that operator would be more attentive to its contractors' safety records and start demanding better health and safety performance. A disproportionately high rate of accidents is attributable to contractors, so this change is warranted. And while any operator could be demanding better compliance with mine safety laws and regulations, operators generally have made no effort to exercise this power. Imposing the legal requirement is appropriate and should effect better contractor compliance with Mine Act requirements.

Miners continue to be intimidated into working in an unsafe manner, and this has got to change. As you heard at the Beckley WV hearing in May 2010, and as Jeff Harris testified before the Senate HELP Committee in April 2010, miners have provided testimony about how difficult it is for them to raise safety concerns at a non-union mine. Even when they know that their work environment is dangerous, miners are reluctant to voice safety issues because jobs are scarce -- and coal-mining jobs pay well. The testimony confirmed that a miner working at a non-union operation has good reason to fear losing his job for complaining about unsafe conditions. But no miner should have to choose between earning a good paycheck (while praying he will survive) and working safely. No worker should feel he is jeopardizing his family's economic security by raising bona fide work concerns on the job. And no miner should be told he needs to find another job when he tries to exercise the statutory right to refuse unsafe work, as coal miner Steve Morgan reported his 21-year old son Adam Morgan was told by his boss at the Upper Big Branch mine before perishing in the April 5 disaster. In short, the anti-discrimination protections in the existing law are terribly important, but they

don't go far enough to protect miners. H.R. 5663 addresses this continuing problem by making sure that miners are specifically trained each year about their safety rights, and authorizing punitive damages and criminal penalties for retaliation against miners who blow the whistle on unsafe conditions.

As for accident investigations, the Act requires MSHA to investigate all serious accidents. However, it now does so with one arm essentially tied behind its back. This results from the fact that MSHA investigative interviews are conducted on a volunteer basis. That is, MSHA identifies who might have helpful information and invites them to meet with the Agency. Any individual may decline MSHA's invitation. Likewise any witness can leave the interview at any

time. The only exception lies with the public hearing option, for which MSHA has the power to subpoena witnesses and documents, but which has rarely been used. We think MSHA should have the subpoena power for all accident investigations, not just for a public hearing component of an accident investigation as is expected to occur as part of the Upper Big Branch investigation. By providing MSHA with the subpoena power MSHA could speak with anyone it thinks has relevant information to contribute and it would give MSHA broader authority to review records. We also think that granting the Agency subpoena power for inspections would better protect miners who may wish to speak with MSHA inspectors. The legislation would make these changes.

In the aftermath of the Upper Big Branch tragedy, we urged MSHA to conduct a public hearing for its primary investigation for multiple reasons: only by doing so could it utilize its subpoena power; and we believe that allowing an open hearing would permit more issues to be more fully explored, reducing the possibility that some less popular but still any feasible theories about root causes would be overlooked. Yet, MSHA chose to conduct this investigation largely behind closed doors. We think that procedure creates needless problems. And while MSHA plans to conduct a separate investigation into its own conduct as it relates to the Upper Big Branch mine, such an internal investigation could produce issues that bear on the primary investigation. It would be best if all such issues would be raised, considered, and resolved at the same time, not sequentially. We also believe that MSHA should not be the one investigating its own conduct, but an independent investigation team should perform this analysis. The proposed legislation addresses this by requiring a parallel and coordinated investigation to be performed under the direction of NIOSH for all accidents involving three or more fatalities. The independent team would include knowledgeable participants from other interested entities, including employer and worker representatives. We think this procedure will help assure the mining community, Congress, and the public at large that the investigation is thorough.

However, the proposed legislation should be adjusted to incorporate a role for the miners' representative to participate fully in all accident investigations.

For some of the more recent multi-fatal accident investigations, even though the UMWA was designated as a miners' representative, the UMWA was excluded from the accident interviews. The miners' representatives are permitted to join in the underground investigation, but little more. Without being allowed to join the interviews, the miners' representative cannot fully represent the miners at the operation who have selected such a representative.

▲ The Upper Big Branch investigation is another current MSHA accident investigation in which the UMWA has been excluded from the interviews even though the Union has been designated as the miners' representative for miners at that operation. The government has claimed that the on-going criminal investigation justifies MSHA's closed-door investigation and the exclusion of the miners' representative. Yet, for another investigation now taking place - that following the BP explosion in late April -- there is also a parallel criminal investigation. If simultaneous civil and criminal investigations are feasible in that context we believe it should also be viable for accident investigations within MSHA's jurisdiction. We thus urge a change in the legislation to specifically provide for miners' representatives to fully participate in all accident investigations. After all, miners who made their designation have a significant interest in learning what happened, and they may be returning to work at the same operation. They should have a seat at the table in the form of their designated representative.

There has also been a recurring problem with the process of designating a Section 103(f) miners' representative after a disaster occurs at a non-union operation. The Act does not presently provide for a family member to designate a miners' representative on behalf of a miner who is trapped or dies in a mine accident. The proposed legislation would change this, so that the family member may exercise the right to designate a miners' representative if the miner is unable to exercise his right due to a mine accident.

Though we don't yet have official information from the accident investigation, it is generally believed that inadequate rock dusting exacerbated the

Upper Big Branch explosion. This legislation would require more protective rock dust standards. To reduce the likelihood of dangerous coal dust explosions, the Bill also requires the use of technology to better monitor rock dust compliance.

To the extent the proposed legislation anticipates MSHA rulemaking and

authorizes the Agency to exercise new and expanded responsibilities, we wish to note that it will require full funding for these new mandates. I think we can all agree that it would be far better to support a pro-active MSHA than to fund yet more large-accident investigations.

Finally, the UMWA is in support of those provisions of the proposed legislation that would fall within OSHA's jurisdiction.

Thank you for allowing me to speak about H.R. 5663; we look forward to

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working with you to pass it into law.

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it had serious problems with its safety practices and initiated changes that yielded significant improvements, under the current scheme that mine might be vulnerable to a POV in 2010, after its safety practices had improved.

The POV tool is an extreme one and should be available for MSHA to help put an immediate end to unsafe work practices before miners get hurt. It is precisely when MSHA inspectors are writing an unusually large number of citations and orders that a mine should receive the extra attention POV anticipates,

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not years later when those citations - if contested - finally become final orders. And because the overwhelming percentage of citations and orders that MSHA inspectors write are upheld even when contested, there is no serious issue about due process based on a POV process that is prompted by written citations as opposed to final orders. In FY 2009, only 4-11% of litigated penalties related to unwarrantable failure and S&S citations ended up being withdrawn or dismissed. With a POV program re-focused on rehabilitation rather than punishment, and given the small withdrawal and dismissal rate, it is fully consistent with the protective purposes of the Mine Act to err on the side of safety and accept this modest margin of error. The proposed legislation would make the POV program more remedial and less punitive, which we support. The goal must be to turn operations with the worst health and safety records into much safer operations, and to teach the miners and managers about what is required to operate safely so they will do so on a long-term basis.

A related issue that also affects the POV program arises from the current system for accident and injury reporting. Operators are required to report on all accidents and injuries and to file quarterly reports with MSHA. However, the reporting process is now badly flawed. Operators go to extraordinary lengths to dissuade their employees from ever filing accident reports even when an injury is serious. Some would rather pay an employee with a broken back to perform light duty than have him report the injury. While we have heard stories about these practices for years, former Massey employee Jeff Harris testified about his personal knowledge of this practice when he addressed the Senate HELP Committee on April 27, 2010.

To the extent that accident and injury reports constitute a factor used in measuring an operator's relative safety record for POV status, all operations should

be obligated to report accidents and injuries pursuant to the same objective standard. This is an area where changes may be required for H.R. 5663. Only if accident and injury reports are regularly and reliably filed can we learn about

## **Attachment 2**

Cecil E. Roberts, President  
United Mine Workers of America  
Testimony before the  
House Committee on Education and the Workforce,  
Full Committee on Workforce Protections on  
Learning from the Upper Big Branch Tragedy

Tuesday, March 27, 2012  
Hearing Room 2175  
Rayburn House Office Building  
Washington, D.C.

Thank you for the opportunity to address the *House Committee on Education and the Workforce, Full Committee on Workforce Protections about Learning from the Upper Big Branch Tragedy*. I am the International President of the United Mine Workers of America (UMWA), a union that has been an unwavering advocate for miners' health and safety for over 122 years.

Before I speak about what we can learn from the Upper Big Branch tragedy, I want to acknowledge all of the families that lost a loved one and neighbors who lost a friend in the senseless methane/coal dust explosion on April 5, 2010. The 29 families all suffered a loss that we can never forget. The victims paid with their lives for the deliberate greed of Don Blankenship and his underlings.

The UMWA has long held that three things are necessary for a safe and productive mine:

- An operator who is willing to follow the law.
- An agency which fully enforces the law.
- Workers who are empowered to speak out for themselves.

None of these things happened at the non-union UBB mine.

Don Blankenship's team pursued a game of cat and mouse with the Mine Safety and Health Administration (MSHA). While MSHA inspectors were trying to determine whether Massey was following mine health and safety laws and regulations, as all operators are required to do,

Blankenship's management was regularly doing what it could to *subvert* MSHA's efforts. Every day they did that, they jeopardized the safety of all miners working under their control and direction. On April 5, 2010, the vulnerable miners at the Upper Big Branch mine fell victim to the needlessly dangerous and neglected mine environment.

It is not a secret in the coalfields that some operators give advance notice to miners working underground of MSHA inspections. Mine Managers make quick and superficial adjustments to the ventilation, quickly rockdust the entries where an inspector would be headed or shut down production entirely on a working section in order to avoid being cited for violating MSHA's standards. Through the work of the United States Attorney's office in Charleston, West Virginia, we finally have public confirmation from one of the Massey managers who affirmatively engaged in such deceptive practices. Earlier this month, Upper Big Branch Mine Superintendent Gary May gave testimony in Hughie Elbert Stover's sentencing hearing about that mine's practice and system for providing information to miners working underground whenever federal and state safety inspectors were on the property, with details about where the inspectors would be traveling and inspecting. Stover was convicted and sentenced to three years in prison on February 29, 2012. Mr. May further explained that he acted deliberately to change underground mining conditions to make them temporarily appear better and more compliant than they had been while the mine was actively operating but before learning about the inspector's underground presence.

We don't mean to claim that Massey and its subsidiaries had a monopoly on these illegal practices, but its rogue attitude had become an integral part of the operating culture at the Upper Big Branch mine. It became so bad that miners came to view the unlawful mining practices as the norm. Some of the more experienced miners probably knew that what Massey was doing was wrong, but they had to work. Tolerating unsafe conditions was necessary if they wanted to keep their jobs. On a daily basis, these miners worked in an atmosphere of fear and intimidation. However, there can be no question that for Don Blankenship and his Massey mines, production was the top priority; and the second priority; and the third priority... This is demonstrated by the October 19, 2005 memo Don Blankenship sent to All Deep Mine Superintendents entitled "Running Coal" which stated "*If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal*

*(i.e. – build overcasts, do construction jobs, or whatever), you need to ignore them and run coal. This memo is necessary only because we seem not to understand that the coal pays the bills."*

One stark example of Massey's unlawful behavior was revealed in the report from MSHA's Internal Review where it described Massey's frequent re-staging of its continuous mining machines/mechanized mining units (MMU's) to avoid citations for excessive respirable dust. Cutting coal creates mine dust that must be both reduced and controlled through ventilation, water sprays and rock dust to protect miners' lungs and to prevent explosive coal dust accumulations. Autopsy records of the UBB miners who were killed in the explosion uncovered surprisingly high levels of black lung and other lung disease within this workforce, including among the youngest victims. Seeing what the Internal Review discovered about MSHA's ineffective enforcement of the respirable dust standard (30 CFR Part 70) at UBB suggests miners at this operation were often exposed to excessive levels of respirable dust.

MSHA's regulations set maximum permissible respirable dust levels and require reductions to the dust levels depending on how much quartz is also present. However, as the Internal Review explained, MSHA District 4 allowed Massey to re-establish (that is, to increase) its permissible dust levels whenever it rotated its MMUs. Therefore, even though MSHA would establish a reduced respirable dust level for a certain area based on the level of respirable coal dust and the percentage of quartz generated by a MMU, Massey was able to avoid compliance with that reduced respirable dust standard simply by rotating out the MMU that was used to set the reduced level. With a different MMU in place, MSHA terminated any citation that was issued for excessive dust and allowed Massey to operate its replacement MMU with dust at the unreduced standard of 2.0 mg/m<sup>3</sup> even though the same amount of quartz would have been present. This deliberate manipulation of the dust standard, established by the law, was the practice according to the Internal Review. MSHA District 4 also regularly allowed Massey to have abnormally long abatement periods for its dust citations. Massey was manipulating the law and too often MSHA District 4 allowed the company to get away with it.

MSHA's Internal Review outlines numerous deficiencies on the part of the Agency. These MSHA shortcomings, in particular MSHA District 4, allowed miners to remain in harm's way though the Agency should and

could have prevented such exposures. In other words, although Massey failed in its duty to comply with mine safety laws and regulations, MSHA had a duty to utilize every enforcement tool at its disposal so that miners' safety would not be jeopardized. Massey made MSHA's job much more difficult by its subterfuge, but that doesn't excuse or explain MSHA's shortcomings.

We now know that MSHA District 4 inspectors failed to:

- Inspect some areas of the mine (including in its last inspection, the Old No. 2 Section and the belt/return entries of Tailgate #22 tailgate, both areas where the explosion propagated), and rushed their inspections through other areas.
- Cite lack of adequate roof support controls that the roof control plan specified.
- Identify inadequacies in the coal and coal dust program including failures in the cleaning of loose coal, coal dust and float coal dust and the extent and duration of noncompliance with rock dust standards along belt conveyors.
- Use current rock dust survey procedures and to collect spot samples from older sections of the mine to see that UBB had the required incombustible content of rock dust to mine dust.
- Scrutinize the operator's examination records and require timely abatement of hazards cited and consider the hazards for purposes of determining the operator's degree of negligence.

MSHA District 4 Supervisors, who had jurisdiction over the Upper Big Branch mine, did not provide effective oversight of the inspectors. District 4 failed to:

- Conduct 110 (c) special investigations (to determine if mine management knowingly violated mandatory standards) when established protocols indicated that would have been appropriate in six cases.
- Forward to MSHA's Arlington Headquarters eight violations that should have been considered for "flagrant" violations.

Further, in reviewing mining plans for approval, experienced MSHA District 4 personnel made a number of mistakes, including:

- Not requiring methods in the ventilation plan that would mitigate methane inundations like the one that occurred in 2004.
- Not recognizing that (a) the roof control plan did not provide necessary pillar stability for ventilation in some areas and (b) the roof control plan did not include any of the required stability calculations to show the plan would be adequate.

MSHA headquarters also failed to:

- Realize - due to a computer glitch – that the mine’s violation history qualified UBB for the “Potential Pattern of Violation” list.
- Use or distribute its directives and policies effectively, some of which conflicted with each other. MSHA employees did not always understand the policies.
- Ensure that all entry-level or journeymen inspectors had the required training. Some of those responsible for inspecting or supervising inspectors at Upper Big Branch did not have all the required training. MSHA’s own policy does not permit entry-level inspectors to travel by themselves, which occurred at UBB.

The scope of internal MSHA problems ran from top to bottom. However, MSHA District 4 Supervisors dropped the ball by ignoring several red flags as I previously stated.

The Internal Reviews following the previous five underground coal mine tragedies of the preceding decade (Jim Walter Resources in 2001; Sago, Aracoma and Darby in 2006; and Crandall Canyon in 2007) identified a number of problems that persisted into 2010. It is time that we stop talking about these problems and fix them.

While it may be appropriate to criticize the mistakes MSHA made before the UBB tragedy, it would be a huge disservice to the miners who perished at UBB and to their families if that is all we did. Instead, we should think proactively and take affirmative steps to make mines safer.

Immediately after the Upper Big Branch tragedy MSHA began its program of impact inspections, targeting operations where it has reason to be concerned about Mine Act compliance. MSHA captures the mine communications system to prevent advance warnings of inspections. MSHA's impact inspections have uncovered large numbers of significant and potentially dangerous conditions. The Agency has also gone to court to test its authority to seek injunctions. These techniques have been successful in preventing operators from continuing to operate in the most hazardous of conditions.

Even a more aggressive MSHA, one that uses the array of enforcement tools never used before the UBB tragedy, cannot protect miners if mine operators continue to flaunt the law. And too many do.

The UBB disaster serves as a stark reminder that the culture of production over health and safety still exists in the coalfields. Don Blankenship and Massey represented the worst of the coal industry. They flagrantly violated and ignored the law at the expense of the miners. Don Blankenship's philosophy cost the lives of 29 miners at UBB and countless others that lost their lives at Massey's mines.

The UMWA applauds the U.S. Attorney's office for pursuing criminal prosecution against individuals who contributed to the April 5, 2010 tragedy at UBB. However, allowing Don Blankenship to walk away from the crimes he and his underlings committed at UBB would be a gross miscarriage of justice. He laid out the rules under which UBB operated and kept a watchful eye to ensure that his policies were being followed. Don Blankenship should be prosecuted for his actions and I stand here today saying to this Committee that until corporate heads like Don Blankenship are held accountable for their actions, we have not witnessed the last senseless tragedy and loss of life in the coal industry.

What is also upsetting to me is the misdemeanor plea deal that federal prosecutors recently reached in the 2007 deaths of nine workers at the Crandall Canyon Mine in Utah. Murray Energy's subsidiary, Genwal

Resources, agreed to plead guilty to two mine safety crimes and pay \$250,000 for each of the two criminal counts. The travesty of justice is that the plea agreement states that no charges will be brought against any Genwal mine managers or any executives. Once again, the real guilty parties escaped justice. I guess the cost of nine lives is \$500,000.

MSHA cannot be everywhere all of the time. That is why the law correctly charges operators with the duty of operating in a safe and healthful way. If an operator wants the privilege of running a coal mine, it must assume the obligation of doing so in a way that doesn't put its employees' lives in jeopardy. Yet, this doesn't always happen. Too often corporate greed takes precedence. We urge Congress to increase the penalties for egregious mine health and safety violations.

So what else can we do to reduce the likelihood of any more coal mining disasters? We owe it to all miners to learn from the problems that led to the Upper Big Branch tragedy as well as from other disasters.

What this Committee and Congress does really matters to the coal miners of this nation. After the Sago mine disaster and others in 2006, Congress required that coal operators make underground shelters available to protect miners who survive but cannot escape an explosion or mine fire. Despite the tremendous explosive forces that rocked the Upper Big Branch mine, a shelter near the explosion survived intact and could have sheltered miners *if* they had survived the explosion. That Strata shelter was under water for weeks, and yet it remained dry inside. Had that shelter been at the Sago mine in January 2006, eleven of the twelve miners killed would still be with us today. Without Congress advancing the issue in the 2006 MINER Act, we still would not have shelters underground.

Again, through the MINER Act, Congress required significant improvements in tracking and communications' technology and equipment. Coal operators claimed it couldn't be done, or the costs were too high to allow them to remain in business, but Congress appreciated that changes were necessary and demanded that the industry implement the improvements. By legislating these changes, there was a flurry of imaginative and creative work done to develop practical equipment that could survive the harsh mine environment. These state of the art systems are in place all over the United States today.

We appreciate that some operators are spending more money on equipment and technology to make the mine environment safer for miners. However, more improvements can be made. For example, rock dust sampling results are not completed in a timely fashion. The mine environment can become extremely explosive in a very short period of time if rock dust is not applied regularly. Rock dust is required to minimize the explosiveness of coal dust in case there is an ignition source present. While better and newer dust explosibility meters exist, most operators – as well as MSHA – are not purchasing them because they are not required to use them. This equipment can provide immediate, real time information about the incombustibility of rock dust to coal dust levels. Instead, the current protocol provides for the samples to be sent to MSHA's lab, where the Agency uses antiquated equipment to test the samples. It takes 2-3 weeks to return the results. I would like to point out that operators like Consol, Patriot and Alpha are taking advantage of this new technology. At Upper Big Branch, samples taken *before* the April 5 explosion showed that the mine had inadequate rock dust – but those sample results were not reported until *after* the disaster. We are left to wonder whether having the results in real time would have averted this disaster.

The illegal practice of advance notice of safety inspections is not limited to Upper Big Branch but occurs at many operations. MSHA's recent tactic of taking control of the communications systems when inspectors travel to operations has demonstrated that advance notice is not uncommon: the kind and extent of violations found when the communications are taken over exceed those MSHA had previously discovered. Clearly, the existing penalties for advance notice are ineffective and should be increased to help effect compliance.

Another area where the Mine Act should be updated concerns its whistleblower protections. The Mine Act was one of the first to provide whistleblower protections against discrimination or retaliation for reporting safety violations. However, these provisions are now inferior to recent and more-protective whistleblower provisions included in other statutes. Miners under the Mine Act now have only 60 days to blow the whistle. This window should be lengthened to give miners a better chance to pursue actions when they suffer discrimination or retaliation for exercising their health and safety rights.

The compensation provisions in Section 111 of the Mine Act should also be expanded. As it now stands, miners generally can collect no more than one week's worth of wages when an operator's violations require MSHA to shut down the mine. Too often miners have to make the choice between putting food on the table and protecting their own safety. By expanding the compensation provisions, miners' health and safety would be better protected.

MSHA's accident investigation procedures must also be modernized. The UMWA has always advocated that an independent agency should conduct all accident investigations much like the National Transportation Safety Board. Asking MSHA to critique its own actions following a disaster does not always lead to the most objective point of view. We further believe that the law should be changed to include in the investigation those most affected: the miners and family members of deceased miners. We also believe that MSHA must have the power to subpoena witnesses, rather than rely on voluntary interviews.

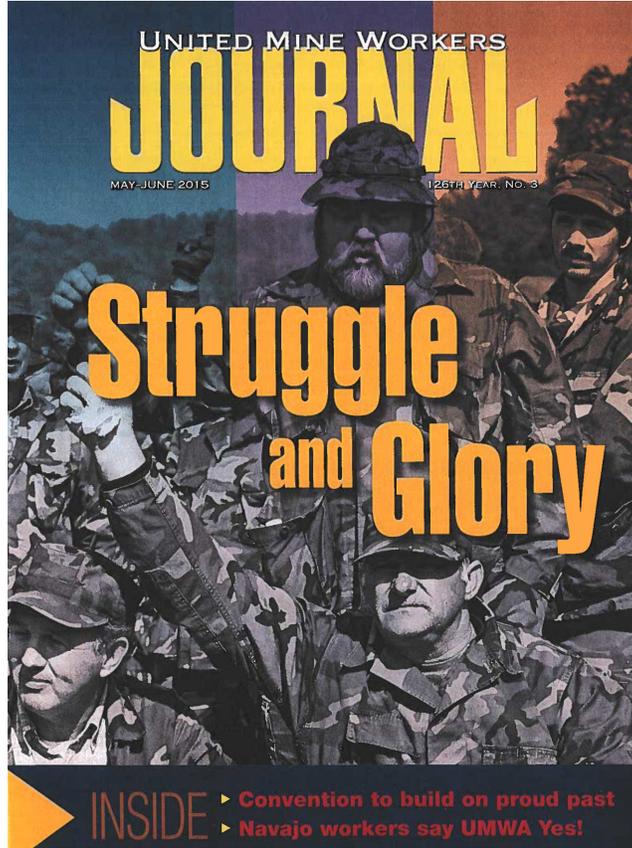
The UMWA is not convinced that any one action by MSHA would have resulted in substantially better compliance on the part of Massey. It is clear that UBB should not have been operating at the time of the explosion. Had MSHA District 4 used all of the enforcement tools at their disposal, the disaster may have been prevented. However, no one should ever lose sight that Massey Energy, including Don Blankenship and his underlings, were mandated by law to comply with all health and safety standards and maintain UBB in a safe operating condition. Instead, the mine was operated in a manner compliant with a corporate policy that put production over safety. This is why I will once again call for the criminal prosecution of these individuals.

The authors of the Internal Review have recommended that the Assistant Secretary consider rulemaking that would modify several health and safety standards. The recommendations are found in Appendix C – Recommendations for Regulatory Changes. There are 23 separate provisions outlined in Appendix C, all of which would improve health and safety protections for miners. The UMWA is in complete agreement with these recommendations in addition to the changes we outlined in our report.

This gets me to my last point. Congress needs to act quickly to pass legislation that will build on the protections of the 2006 Miner Act. As Congress so eloquently stated in the Act: *"the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner."*

In conclusion, I thank you for the chance to appear before this Committee and appreciate your interest and concern for miners' health and safety.

## **Attachment 3**



## OUR HEALTH & SAFETY

### MSHA releases review of new dust rule

The Mine Safety and Health Administration (MSHA) has released compliance information collected during the first eight months under the final rule, *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors*. The initial data demonstrate that about 99 percent of the more than 41,000 samples taken in that period were in compliance. MSHA noted that these samples included both underground and surface coal mining operations, with the bulk of them collected underground.

"The union is encouraged by the level of compliance with the new rule," stated President Roberts. "We are still extremely interested in how the rule will impact the occurrence of black lung disease among active miners in the long run. That will be the true test of its effectiveness."

MSHA also noted that the yearly average dust concentrations measured at designated mining occupations dropped to historically low levels. The agency attributes these reductions to the final rule

and the *End Black Lung—Act Now* campaign that was started in 2009. The data demonstrate that the rule is highly achievable and is working to protect miners.

"This is certainly good news for coal miners," said Secretary-Treasurer Kane. "I think everyone at the union who reviewed the final rule believed that despite the operators' strong opposition, it was a feasible and necessary next step to protect miners' exposure to coal mine respirable dust. We will continue to push for additional sampling at surface mines and locations designated as 'hot spots' by the National Institute for Occupational Safety and Health (NIOSH)."

NIOSH estimates that since 1968, the year before the passage of the Coal Act, more than 76,000 miners have died as the result of black lung disease. Unfortunately, evidence indicates that miners, including younger miners that have worked exclusively under the Coal Act of 1969 and the 1977 Mine Safety and Health Act, continue to contract the disease.

Despite these staggering figures and the ongoing occurrences of the disease, mine operators have filed suit against MSHA to halt the rule's final

implementation. Oral arguments were heard on Mar. 5 by the U.S. Eleventh Circuit Court of Appeals in Jacksonville, Fla. No decision date has been set. ■

### Black Lung Benefits Act



The U.S. Department of Labor is requesting public comments on its recently published Black Lung Benefits Act rule. The rule would afford miners greater access to their health records. It would require all parties involved in a black lung benefits case to exchange all medical data gathered as a result of the claim. It is believed that this would protect miners by affording them all information about their health. Currently, the coal company can develop as much medical data as it can afford, and pick and choose what to submit.

The rule would also require operators to pay all the awards due in the claim before it can be challenged through modification. Coal companies who routinely challenge awards have stopped paying benefits during the modification process, despite being obligated to make such payments.



## Appalachia's unionized coal mines are safer and more productive

The global financial and analytical firm SNL Financials Energy Sector recently released a report that shows unionized coal mines in the Appalachian Basin are not only safer but more productive than nonunion operations in the same geographic region. SNL analyzed reportable accidents, illness and injuries along with production data collected from the Mine Safety and Health Administration (MSHA) to arrive at its conclusion. The information included Calendar Years 2013 and 2014, the most recent available from MSHA.

The analysis showed that for all operating underground coal mines in those years, average production per miner at union operations was 3.6 tons per man in 2013 and 4.09 in 2014. Nonunion operations totaled 3.08 and 3.54 respectively in those same years. The report also notes that the two-year data collection shows that on average, union operations incurred a reportable accident for every 86,546 tons of coal loaded, while nonunion operations reported an accident for every 73,599 tons.

"The information in this report should come as no surprise to anyone who follows the industry," said President Roberts. "The UMWA has known for years, based on our

own internal analysis, that mines where employees are represented by the union are safer, and as a result, more productive. This report simply reinforces that reality."

The SNL report credited MSHA's increased enforcement scrutiny of mines and "the increasing sophistication and professionalization of United Mine Workers of America's safety programs" for the safety trend.

Despite the conclusions reached by SNL's review, industry representatives appeared to ignore the report's findings and instead continue to focus solely on dollars and cents. A representative of the Kentucky Coal Association failed

to acknowledge the health, safety or production information in the report and noted, "At a time when costs are a serious concern due to the price of our product, any additional costs in an organized workforce would be a concern."

"This is a perfect example of no matter how some things change, others continue to remain the same," said Secretary-Treasurer Kane. "You have a report from an independent source echoing the facts the union has been aware of for years, and the operators are tone-deaf. It makes it obvious that despite their rhetoric, it's simply production first, health and safety be damned." ■

### Coal health and safety training scheduled

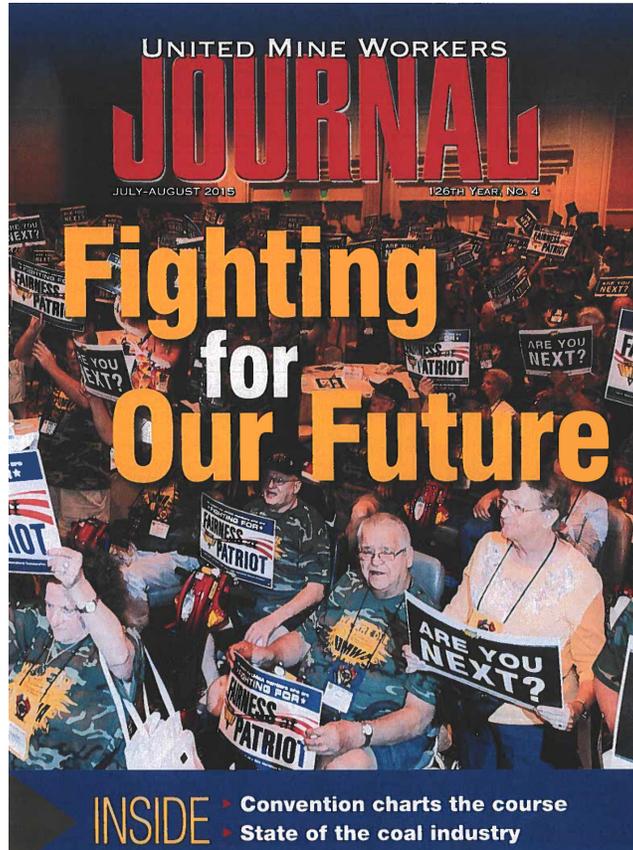
The Health and Safety Department has scheduled the annual coal mine training at the Mine Safety and Health Academy in Beckley, W.Va. Classes are set for Sept. 13-18 and Oct. 25-30, 2015, with each session limited to 70 participants. The department will send relevant information and applications to all coal locals in June. If there are any questions, please contact the department at 703-291-2433.

#### Mine Safety and Health Academy

Sept 13-18

Oct. 25-30

## **Attachment 4**



## Comprehensive mine safety legislation

**S**ens. Joe Manchin (D-W.Va.) and Bob Casey (D-Pa.) recently put forward legislation aimed at enhancing miners' health and safety. The Robert C. Byrd Mine Safety Protection Act of 2015 (S. 1145), named after the former West Virginia senator and mine health and safety champion, is the most recent attempt in the Senate to close some glaring loopholes in coal mine safety.

"The proposed legislation would address several issues the UMWA has been pushing for years," said President Roberts. "One of the most important provisions is giving the Mine Safety and Health Administration (MSHA) the authority to shut down mines that have repeated and significant safety problems. If MSHA had been permitted to take this type of action in 2009, perhaps 29 miners at Upper Big Branch would still be alive today."

Other provisions of the bill would significantly increase monetary penalties for operators who knowingly expose miners to serious risk of bodily injury or death. The bill would also increase the severity of the designation from a misdemeanor to a felony. And for the first

time ever, the legislation would give MSHA the ability to subpoena material information and compel witnesses to testify during the course of inspections or investigations. The agency currently lacks such authority, a problem that has been highlighted many times in the past.

"Miners across the country should not only thank Sens. Casey and Manchin for introducing this legislation, they should also push their own senators to support it," said Secretary-Treasurer Kane. "The bill is not only forward-looking in its approach to protecting miners, it also takes a hard look at mine operators who are delinquent in paying fines for violations for which they have been cited in the past. It's hard to believe that in this day and age, an operator can refuse to pay hundreds of thousands of dollars in fines and still be permitted to mine coal. That is unconscionable."

The UMWA is doing all it can to see that this new legislation moves through the committee process and is adopted by the whole Senate. It is important to contact your senators and urge them to help pass S. 1145 into law. ■

## Hazard inspections at healthcare facilities

**T**he Occupational Safety and Health Administration (OSHA) has issued a bulletin to its inspectors in an attempt to focus greater emphasis on the most common causes of workplace illnesses and injuries among healthcare workers. The agency announced that it will expand the use of its enforcement resources to combat the root cause of these incidents among workers in all areas of the healthcare profession.

OSHA specifically placed extra emphasis on eliminating the causes of musculoskeletal disorders related to patient handling, blood-borne pathogens, workplace violence, tuberculosis and slips, trips and falls.

The directive noted that "workers in hospitals, nursing homes and long-term care facilities have workplace illness and injury rates that are among the highest in the country, and virtually all of them are preventable." The most recent reports from 2013 show that in hospitals alone, the incident rate among workers is 6.4 work-related injuries for every 100 full-time employees.

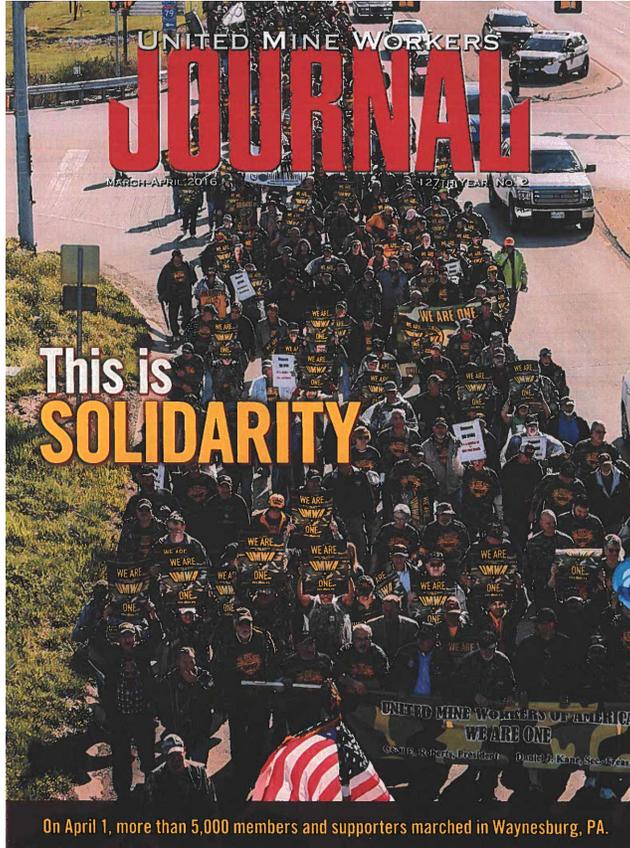
"The accident frequency rate among healthcare workers across the board is unacceptable," stated Secretary-Treasurer Kane. "It's even worse at nursing home and long-term care facilities, which are the places where many of our members work. We will



be working very hard in the next several years to address this problem and protect our members."

OSHA has provided employers at these facilities with educational, training and resource materials to assist in identifying and preventing these incidents. The purpose of the current initiative is to ensure that employers implement necessary changes that will decrease worker exposure to these hazards. ■

## **Attachment 5**



## THE NEXT PHASE OF MSHA Dust Regulation takes effect

Phase II of the Mine Safety and Health Administration's (MSHA or Agency) final rule, *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors* went into effect on February 1. This is the second stage of the three-step Rule initially implemented on August 14, 2014. Phase III will take effect on August 1, 2016.

The Regulation, which took years to promulgate, faced various legal challenges from mine operators in an attempt to block its implementation. Among the laundry list of objections, operators challenged the Agency's authority to issue the Rule under the Federal Mine Safety and Health Act of 1977 and claimed that MSHA can only act jointly on any such Rule with the Secretary of Health and Human Services and NIOSH. The petitioners also challenged "the substance of the rule" with various objections, including arguing that the regulation allows "too wide a variation" for sampling.

After an extensive review of the Rule, when it was initially issued, the UMWA expressed qualified support for the Agency's effort. "The Union is pleased with many aspects of the Dust Rule," stated Secretary-Treasurer Kane. "Our position has not changed from August of 2014. The Rule ad-

dresses some of the concerns the Union has expressed for decades, while it falls short in adding necessary protections for many miners throughout the coal fields. In particular, the UMWA does not believe it adequately monitors workers outby the face areas. And the continuous dust monitor will not be used to monitor dust exposure for surface miners or miners who work on the surface areas of underground mines. Is it better than previous regulations for coal mine dust? Yes. Is it as protective as we would like it to be? No."

This phase requires mine operators to use the Continuous Personal Dust Monitor (CPDM) when sampling certain underground occupations, including miners with evidence of black lung disease, Part 90 miners. The CPDM records real time dust exposure for miners and also calculates the projected exposure should a miner continue to work in the same dust levels for the entire shift, including anything over 8 hours. This permits mine operators and individual miners to take immediate action during the shift to prevent overexposure to respi-



The next phase of the Dust Rule will require many miners to use the latest generation CPDM, like the one pictured here.

nable coal mine dust. The Rule would also require mine operators to post individual sample results on the mine bulletin board within twelve hours after the sampling is completed. Part 90 miners would be given a printed copy of all sampling results.

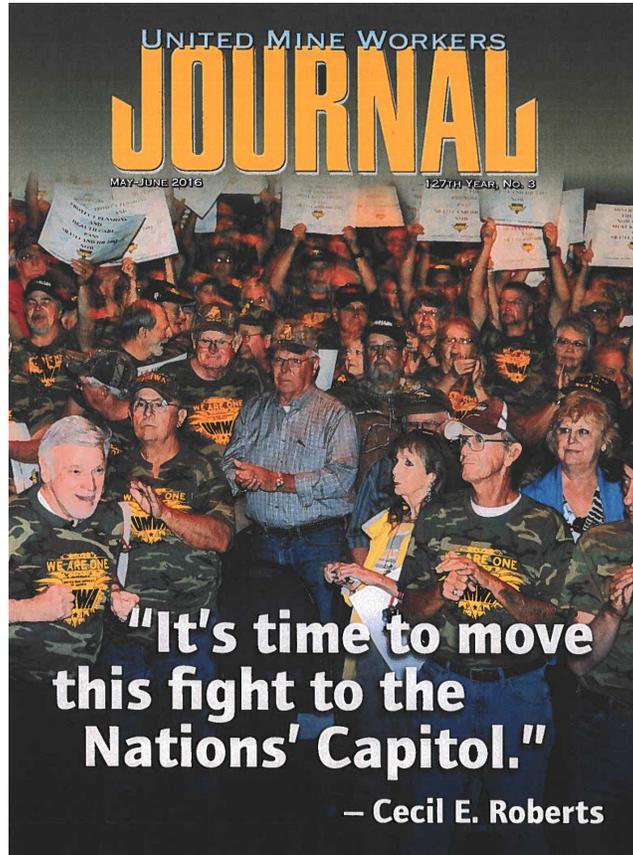
"This is certainly a step in the right direction," stated President Roberts. "The application of the CPDM is something that the Union sees as a potential benefit to miners in managing the atmosphere where they work in real time. We need to make certain these dust monitors are properly maintained and utilized to benefit every miner at the operations."

The final phase of the Dust Rule will take effect on August 1, 2016 and reduce a miners' exposure to coal dust from 2.0 mg/m<sup>3</sup> to 1.5 mg/m<sup>3</sup>. The total concentration of dust a miner is exposed to would be averaged over the duration of the shift actually worked. ■

### UMWA Health and Safety Classes Scheduled

The Department of Occupational Health and Safety has scheduled training classes at the Mine Safety and Health Academy in Beckley, West Virginia. The classes will be held from September 12th through the 16th and October 17th through the 21st, 2016. Both classes will include surface and underground training. The Department will be sending registration information to all active UMWA Local Unions in the near future.

## **Attachment 6**



## MSHA DELAYED USE OF Continuous Personal Dust Monitors

The Mine Safety and Health Administration (MSHA or Agency) temporarily delayed the implementation of key elements of its final rule, *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors*, which went into effect on February 1. The Agency had determined that the use of the Continuous Personal Dust Monitor (CPDM) may cause electro-

problems. The Agency did point out that it is the responsibility of mine operators to ensure the introduction of new equipment or technology is compatible with machinery already operating at the facility. Operators were required to resume dust sampling on that date.

"This was truly a disturbing revelation," said President Roberts. "It is understandable that the intro-



with regard to this matter is that no one was placed in serious danger or injured before the problem was corrected."

"I must admit that when I first learned about the problem I was a bit irritated," said Secretary-Treasurer Kane. "I think it's fair to say that sometime during all these tests that these types of issues should have been discovered and corrected. The Union has been pushing for years to have technology that gives miners more control over the hazards they are exposed to in the mine. It is fair to say that any delay after all these years was not welcomed by anyone concerned about health and safety, but a minor suspension to assure the devices worked properly and did not pose a risk to miners was acceptable under the circumstances." ■

"The UMWA is **pleased** the problem with the **CPDM** was **corrected** in a timely fashion, allowing this **critical** technology to be used **shortly** after the problem was **discovered**."

—PRESIDENT ROBERTS

magnetic interference when used near machines equipped with Proximity Detection Systems (PDS), disabling protections designed to stop the machine before contacting a miner.

According to MSHA's notice, delaying the use of the CPDM solved the immediate problem with the PDS. It has also determined that other devices commonly used underground, including gas detectors, communication devices, laser range finders, trailing cables and variable frequency devices may adversely affect the PDS. The problems were initially made public in a release to coal operators on April 8, just two months after Phase II of the Dust Rule became effective.

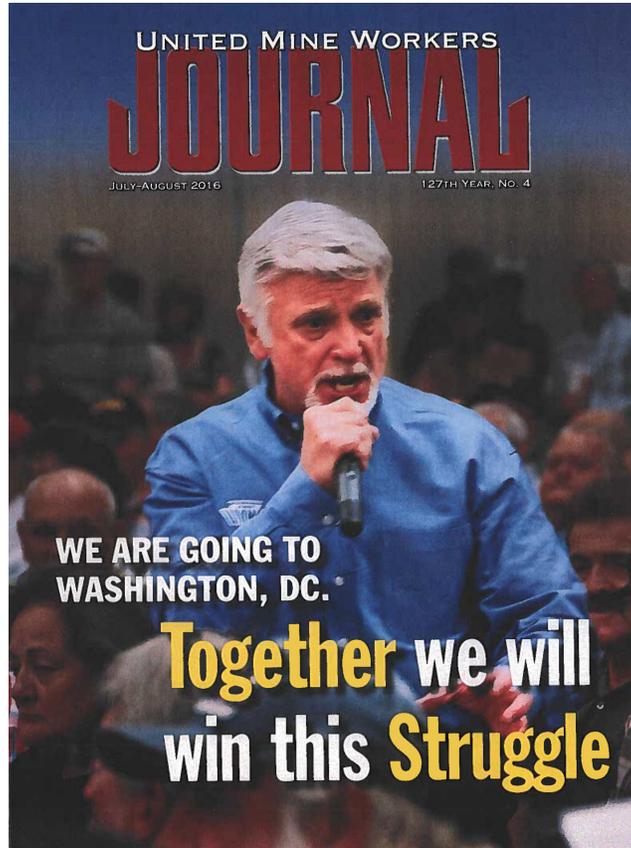
The Agency lifted the delay on May 2 citing the three-week delay was sufficient time for mine operators to correct any interference

duction of new technology can cause unknown problems in any workplace and this can be especially true in a mining environment. However, testing of the CPDM and PDS has been ongoing for years by multiple agencies and mine operators and these types of situations should have been identified prior to implementation of Phase II of the Rule. The silver lining

## UMWA to take action on MSHA's Compliance Assistance Program

The International Union's Department of Occupational Health and Safety has reviewed the Mine Safety and Health Administration's newly instituted Compliance Assistance Program (CAP). The Department does not have a problem with the CAP program in principle, provided it does not interfere with mandatory inspections of the mines and miners are afforded walk-around rights during all such events. The UMWA has had conversations with several Local Unions regarding this matter and filed a 105(c) complaint to ensure miners will be permitted to accompany MSHA inspectors. The Department will keep each Local Union informed of the status of the complaint.

## **Attachment 7**



## OUR HEALTH & SAFETY

### Mine Health and Safety Academy turns 40

The federal Mine Health and Safety Academy (Academy) in Beckley, WV turned 40 years old on August 17th. It is one of nine Academies, including the U.S. Military Academies, that is operated by the Federal Government and the only one dedicated to improving health and safety conditions in U.S. Mines.

While the UMWA is one of the most ardent and vocal supporters of the construction and funding of the Academy, the Union does recognize the enormous efforts of the late Senator Robert C. Byrd (D-WV). "The Union has always been the leading advocate for coal mine health and safety and that will never change," said President Roberts. "However, we can-

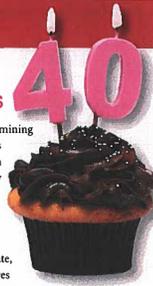
not for one minute forget the efforts of Senator Byrd. He truly was one of the best friends miners ever had."

The Union conducts training classes for all UMWA Local Unions, both underground and surface operations, annually at the Academy. These classes are normally scheduled in the late fall and are designed to keep the membership up to speed on the latest regulations and technologies in the mining industry.

June 15, 2006, also marked the 10th Anniversary of the 2006 Mine Improvement and New Emergency Response Act (MINER Act). The Act requires operators of underground coal mines to improve accident preparedness. The legislation man-

dates that mining companies develop an emergency response plan

specific to each mine they operate, and requires that every mine have at least two rescue teams located within one hour. It also increased both civil and criminal penalties for violations of federal mining safety standards. Passage of the 2006 MINER Act was the first and only time the federal Mine Safety and Health Act has ever been amended. ■



#### FINAL PHASE OF

### MSHA Dust Rule takes effect

On August 1st, Phase III of the Mine Safety and Health Administration's final rule, Lowering Miners' Exposure to Respirable Coal Mine Dust, including Continuous Personal Dust Monitors, went into effect.

The August implementation was the culmination of a two year long process of increasing monitoring frequency of respirable coal mine dust, using the latest technology and lowering the concentration limits of respirable dust permitted in the mine atmosphere. The overall concentration of respirable dust permitted in coal mines is reduced from 2.0 to 1.5 milligrams per cubic meter of air. The standard for Part 90 miners and for air used to ventilate places where miners work is reduced from 1.0 to 0.5 milligrams per cubic meter of air.

Despite almost continuous objections from many coal operators, who complained that the Rule was too

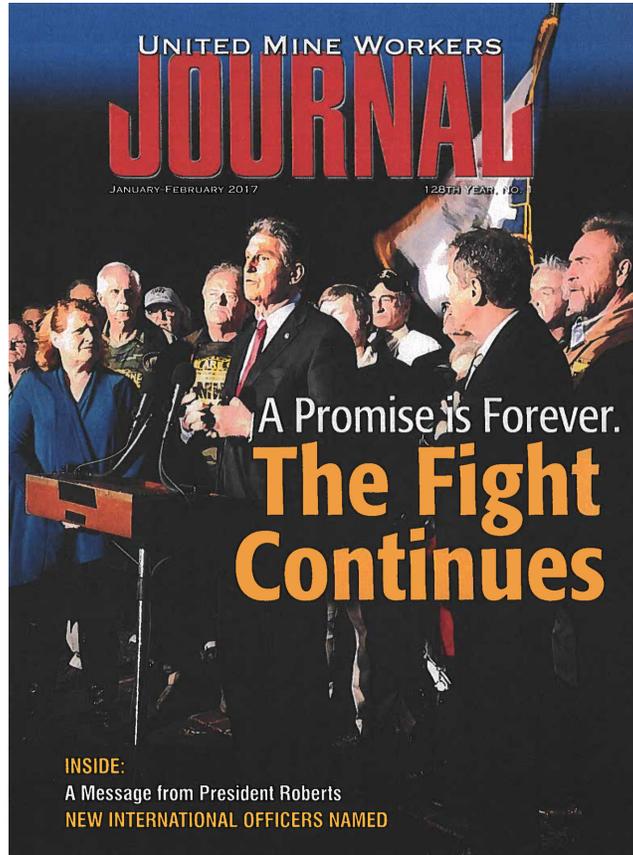
restrictive and therefore impossible to achieve, the most recent sampling data does not support their opposition. Of more than 20,000 samples taken under Phase II of the Rule, between April 1 and June 30 with the Continuous Personal Dust Monitor, 99 percent were in compliance. This is the same percentage of the 87,000 samples taken under Phase I of the new Standard.

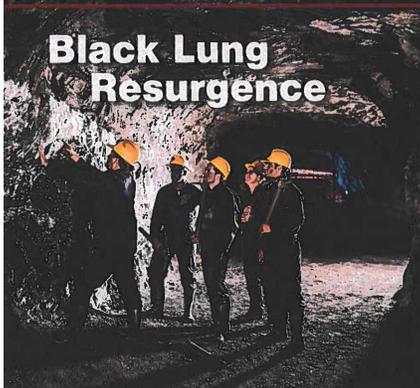
"The Union is very pleased with the implementation of the new federal Dust Standard," stated Secretary-Treasurer Kane.

"There is no doubt that the Union would have preferred additional sampling at all mining operations, especially surface operations and Anthracite mines. But from a practical perspective the Rule, as it is written, is doing what it is supposed to do. Anything that reduces health risks to miners is always welcome."



## **Attachment 8**



OUR  
HEALTH & SAFETYBlack Lung  
Resurgence

**D**espite the best efforts of the United States Department of Labor through the Mine Safety and Health Administration (MSHA) to control exposure to respirable coal mine dust, the number of Black Lung cases currently being diagnosed in Appalachia is unprecedented according to some researchers. In the decades since the passage of the 1977 Mine Act, MSHA has tried everything from new and more stringent regulations, including *Lowering Miners' Exposure to Respirable Coal Mine Dust*, final rule, the use of Continuous Personal Dust Monitors and compliance assistance initiatives to eliminate the conditions that lead to the disease. While it appeared that incidence rate had declined in the 1990's, recent data collected by National Public Radio (NPR) after a report was released by the National

Institute for Occupational Safety and Health (NIOSH) demonstrate a huge increase in Black Lung rates, even among younger, less experienced miners.

NPR obtained data from Black Lung Clinics in Pennsylvania, West Virginia, Virginia and Ohio that shows 11 clinics reporting 962 cases since 2010. This is nearly 10 times the number of cases reported by NIOSH during the past five years. NPR also stressed that the frequency rate could be even higher because some of the 11 clinics had incomplete records and eight other clinics refused to provide any information.

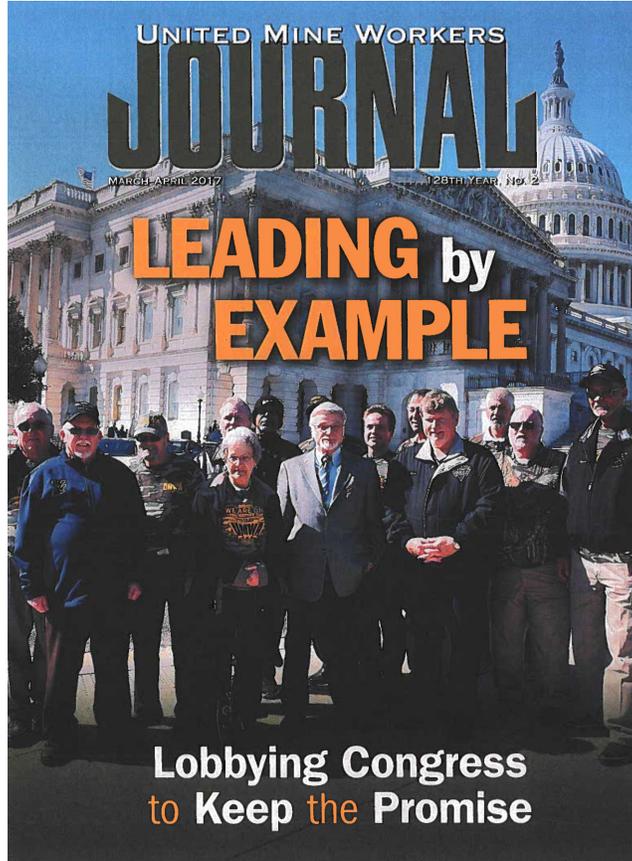
"This new information regarding the drastic increases in the occurrence of Black Lung Disease among miners, especially younger miners with less than 20 years underground, is alarming," said President Roberts.

"It certainly tells you there is something wrong, at least in certain segments of the industry, to allow this to occur. I applaud NPR for uncovering this information. Now we must use it to determine why this is happening and what we need to do to correct it."

As for NIOSH, they acknowledge in their report that they have missed hundreds of cases of the disease. They note the x-ray program is voluntary and only applies to working miners. They cannot compel anyone to participate in the program nor can it test laid-off or retired miners. The situation is further complicated when you consider that miners often avoid testing because of fear of retribution or job loss by their employer. Since 2011 only 17 percent of Kentucky's active mining workforce has been tested.

"This new data is extremely disappointing, but not completely surprising," said Secretary-Treasurer Scaramozzino. "The Union has been making the case for years that larger and more powerful equipment coupled with ever increasing work shifts would have a detrimental impact on miners' health. The Union is also not buying the explanation by some in the industry that these reports reflect historical exposures. Many of these miners have been in the industry less than 20 years—these are today's exposure and incident rates. We do commend the efforts by MSHA to take positive action to eliminate this disease, but if miners want to really reduce their exposure to respirable coal mine dust they need to join the Union. No one else is going to provide them the protections they deserve on the job—no one." ■

## **Attachment 9**



is welcome news to many people, including the families and friends of the 29 miners who perished in the Upper Big Branch Disaster," said Secretary-Treasurer Scaramozzino. "We are acutely aware that the facility where he is incarcerated is more of a country club than a prison and that his punishment does not nearly fit the magnitude of his crimes. At the same time we are forced to accept the fact that sometimes justice is dictated by the status of the individual and not necessarily a just penalty for their offense. That unfortunate fact is obvious in this case."

The Union must point out that the loss of the 29 miners at Upper Big Branch was a horrific event that was the result of willful disregard by the mine operator. It is just as important to note that it was the tragic culmination of the reign of Don Blankenship during which 52 miners lost their lives at Massey Energy mining operations. The sentence handed down by the District Court means Blankenship will only serve a single week in jail for every miner killed while he was CEO of Massey Energy. The punishment may not fit the crime, but at the very least he is no longer operating any coal mines. ■



The Tolt Correctional Institution, where Don Blankenship is incarcerated, is listed as one of the 50 most comfortable prisons in the world.

## U.S. Department of Labor's new Black Lung Medical Payments Proposed Rule

### Does it Reduce Costs or Eliminate Benefits?

The Office of Workers' Compensation Programs (Agency) in the U.S. Department of Labor issued a notice of Proposed Rulemaking and request for comments on January 4, 2017. The proposal deals specifically with the Black Lung Benefits Act (BLBA): Medical Benefit Payments from the Black Lung Trust Fund to every category of medical provider including hospitals, doctors and clinics.

The background information provided by the Agency notes several times that the payments to providers for Black Lung related services will be reduced. The Agency also stresses on numerous occasions that payment reductions will be advantageous because the... "Trust Fund is more likely to be fully reimbursed for the payments it makes on an interim basis." They also anticipate cost savings based on reduced payments from the Trust Fund for miners eligible to receive medical treatment when the operator responsible for their Black Lung treatments cannot or will not make the required payments.

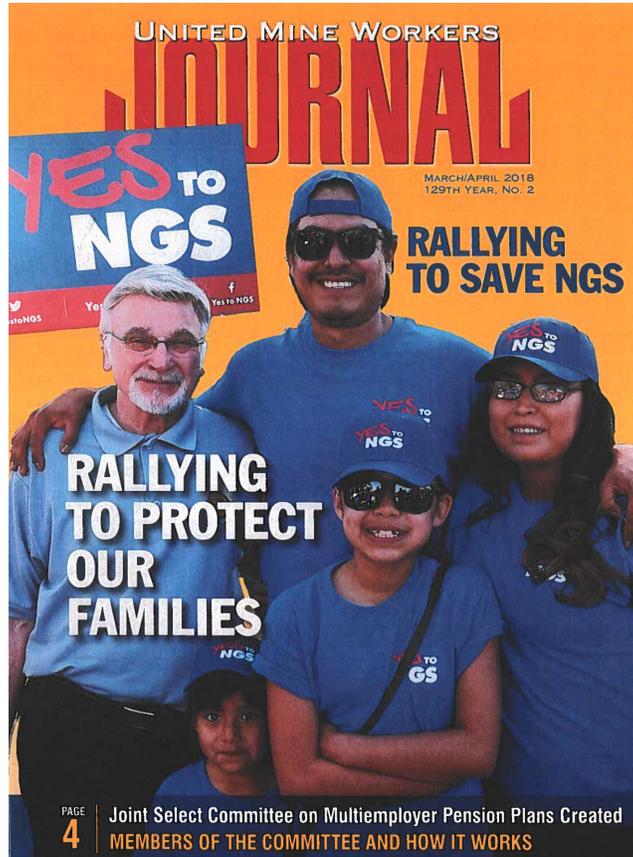
"The United Mine Workers has carefully reviewed the Rule proposed by the Office of Workers Compensation Programs and is deeply concerned that in an effort to unilaterally reduce costs, they have lost sight of what is important—the health and well-being of the miners and their families," stated President Roberts. "It is unclear when you examine the proposal if the Agency is looking out for the best interest of disabled miners or trying to save money for mine operators who are ultimately responsible for paying the medical bills of these individuals. This is a bad proposal, and the Union will do whatever it can to see that it doesn't take effect."

#### The Proposed Cuts would be Devastating

While the Agency claims the average cuts to the program amount to approximately 7 percent of total benefits paid, the decreases for some states are drastic. In Kentucky, for instance, inpatient hospital costs in 2014 were paid at 36 percent of total billing. Under the Proposed Rule those payments would be reduced to 26.5 percent of billing, a cut in benefit payments of almost \$1.3 million per year. In Florida, where many UMWA Members reside, the cuts would be even more severe, from 64 percent of total billing to less than 18 percent. The most glaring example of these draconian cuts are the payments made for outpatient hospital services, cuts that would affect every state in the program. The Agency is proposing reimbursement for these services at just 20 percent of current payments; a reduction of 72 percent.

"The Union is convinced that the Proposed Rule, as it is written, would damage the Black Lung Program so severely that it would eventually become even more ineffective, leaving miners disabled from the Disease without adequate medical care," said International Secretary-Treasurer Scaramozzino. "The Agency discusses how the cuts they are proposing will have little impact on the health care industry as a whole, but they seem to ignore the fact that small communities, where these services are offered, are not reflective of large metropolitan areas in the Country. The proposal appears to be aimed at reducing payment schedules to the point it forces providers to stop offering services that miners are entitled to under the BLBA. The UMWA Department of Occupational Health and Safety has already submitted comments opposing the Agency's Proposed Rule. It will continue doing whatever is necessary to ensure miners receive the benefits the BLBA is required to pay."

## **Attachment 10**



## BLACK LUNG SURGES; A Tragedy – But Not a Surprise

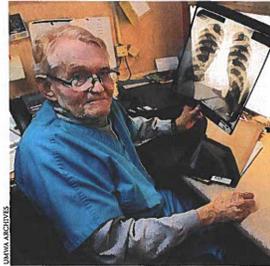
From the early days of the 20th Century, until the passage of the 1969 Coal Act in the wake of the Farmington #9 Disaster, over 100,000 miners died in the United States from Black Lung Disease. In 1978, the federal Mine Safety and Health Act set limits on miner's exposure to respirable dust, and the incidents of Black Lung slowly decreased across the industry. By the mid-1990's, many in the industry were touting the eradication of the disease all together.

In 2016, that notion was shattered when National Public Radio (NPR) announced it had uncovered an alarming increase in the worst kind of Black Lung cases known as Progressive Massive Fibrosis (PMF) or complicated Black Lung in Pennsylvania, West Virginia, Virginia and Ohio. The report showed that from 2010, until its release in December of 2016, eleven Black Lung clinics in these four states identified 962 cases of the disease. NIOSH reported a small clinic in Kentucky had diagnosed 60 cases of PMF in a twenty-month period.

### As Black Lung Rates Increase, Government Tries to Back Away

"This is an extremely disturbing situation," said Secretary-Treasurer Allen. "In December of 2016, we hear that NPR is breaking a story about a huge increase in Black Lung cases among younger, less experienced miners. Then, just a month later, in January of 2017, the U.S. Department

of Labor issued a notice of Proposed Rulemaking for the sole purpose of reducing medical benefit payments from the Black Lung Trust Fund. Now we are learning that the incidence of the disease is far worse than first reported and is considered by some experts to be an epidemic. This



Dr. Donald Rasmussen looks over x-rays of miners diagnosed with Progressive Massive Fibrosis or complicated Black Lung Disease. Dr. Rasmussen was a pioneer in Black Lung research his entire career. He worked tirelessly on behalf of coal miners who had contracted the disease. The recent revelations by National Public Radio and the National Institute for Occupational Safety and Health of the epidemic resurgence of the disease would have troubled him greatly.

is absolutely unacceptable. We must determine the reason for the spike in Black Lung cases and take action to address the problem. At the same time, we need to ensure miners who have contracted the disease receive the medical treatment they deserve."

The latest report issued by NIOSH in February of 2018, confirms 416 cases of PMF in three clinics in central Appalachia from 2013 to 2017. According to news reports, NIOSH epidemiologist Scott Laney noted, "This is the largest cluster of progressive massive fibrosis ever reported in scientific literature."

### This is a Compliance Problem

"The resurgence of this horrible disease is the result of many factors that are impacting the coal industry today," stated President Roberts. "Many experts and industry officials have cited a litany of reasons for the increase, but in the end, none of those things matter. The fact is, Black Lung is a preventable occupational illness. With the knowledge we have about how this disease is contracted

and the technology currently available to mitigate respirable coal mine dust, there is no reason for a miner to contract Black Lung. This is not a dust problem, it is an enforcement and compliance problem. It is about mine operators putting production above miners' health and safety while state and federal agencies worry more about compliance assistance programs than they do about enforcing the law. Steps must be taken immediately to correct this situation."

Stone Mountain Health Services, which operates clinics and services miners primarily from Virginia, ▶

**OUR  
HEALTH & SAFETY**
**Black Lung Surges** *continued*

Kentucky and West Virginia, generally diagnoses five to seven cases of PMF annually. In recent years, that number has skyrocketed. Since NIOSH concluded its fieldwork just over a year ago, Stone Mountain Clinics have diagnosed 154 new cases of PMF.

"It is absolutely outrageous to be in this situation in 2018," said President Roberts. "We know how to prevent this disease, but given these numbers, it is clear preventative measures are being ignored. We also know that once a miner contracts

Black Lung, there is no cure. They will be subjected to the slow and painful death by suffocation that is the end result of this insidious disease. Miners and their families deserve better, and the UMWA will do all it can to see this problem is properly addressed." ■

**Fatal Coal Mining Accidents Nearly Doubled in 2017**

The number of coal miners who lost their lives in 2017 reached 15, nearly doubling the 2016 total of eight. That figure also eclipses the number of miners killed in the industry in 2015, when 12 coal miners died on the job. These numbers represent a potentially alarming trend in the industry that has seen a steady decline in mining deaths since 2010, when 48 miners were killed in coal mining accidents.

"Current trending patterns with regard to mine accidents and fatalities are almost always an indication of what is to come," said Secretary-Treasurer Allen. "The Union is acutely aware of the fact that historical data shows that, without strong enforcement of the Nation's mining laws, accidents and fatalities will increase over time. The end result is, more coal miners will die on the job in single-incident accidents until ultimately a catastrophic event occurs, claiming multiple lives. That is not a guess or an assumption. These correlations are borne out by historical data. The nearly 100 percent increase in mining fatalities from 2016 to 2017 is not an anomaly, it is a warning."

The federal Mine Safety and Health Administration (MSHA or the Agency) charged with enforcing federal mine

laws and investigating coal mining accidents and fatalities, operated for most of 2017 without a replacement for Assistant Secretary of Labor for Mine Safety and Health Joe Main, who left in January. The Administration did not nominate the current MSHA Chief David Zatezalo, the former CEO of Rhino Resources, until September 5, 2017. Zatezalo was not confirmed by the U.S. Senate until November 15, 2017, almost 10 months after Main's departure from the Agency.

**MSHA Tries to make Compliance Assistance the Norm**

It was during this time, and in the months since Zatezalo took control of the Agency, that MSHA ramped up its Compliance Assistance Program (CAP). The CAP is an extremely controversial and non-enforcement initiative implemented by the Agency. The Union has opposed the Program which forces MSHA inspectors to act as observers during coal mine inspections by stripping them of all enforcement power.

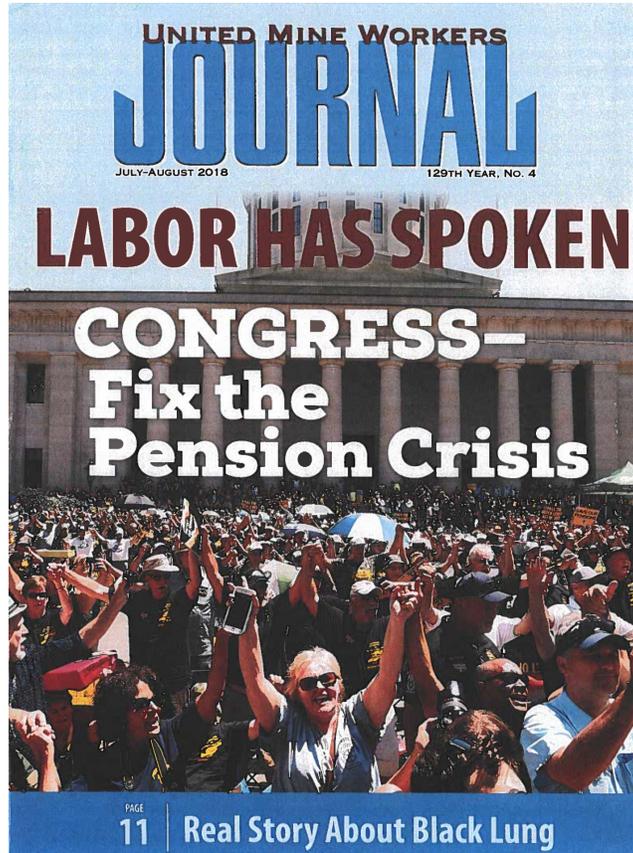
"The policies and distractions that have been hampering the Agency's primary mission of protecting the health and safety of the Nation's miners during the first 10 months of 2017 do not ap-

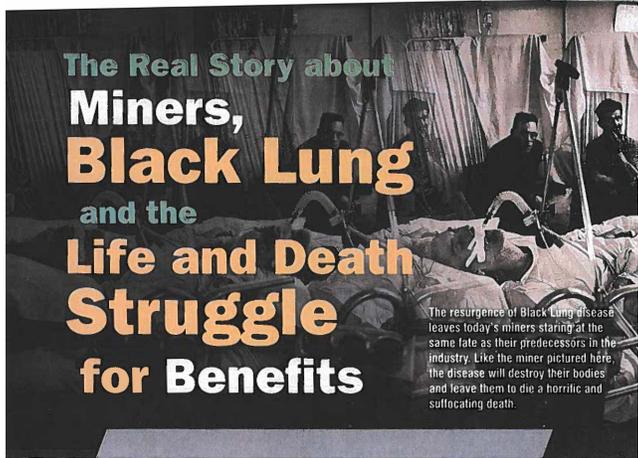
pear to have changed since Mr. Zatezalo arrived at MSHA," stated President Roberts. "The CAP initiative is simply a 'get along' program that permits mine operators the opportunity to violate federal law and place the lives of miners at risk, while federal inspectors stand by, powerless to stop them. The Union is convinced this program is a clear violation of federal statute. The Agency does not have the authority to disregard the laws passed by Congress by eliminating a federal inspector's ability to enforce that law. The Mine Act requires every inspector to cite all violations found by a Representative of the Secretary. The Union intends to pursue a remedy to this illegal and arbitrary program."

**Government Review to Roll Back Regulations is NOT Tolerable**

"Furthermore, during the Agency's current review process, any attempts to roll back a single health and safety law by the leaders of MSHA, they better understand the depth of the fight they are asking for," President Roberts continued. "Every law they are reviewing was the result of a miner or many miners losing their lives to this industry. The UMWA will not stand by and allow these protections to be eroded or stripped away."

## **Attachment 11**





The Real Story about  
**Miners,  
 Black Lung**  
 and the  
**Life and Death  
 Struggle  
 for Benefits**

The resurgence of Black Lung disease leaves today's miners staring at the same fate as their predecessors in the industry. Like the miner pictured here, the disease will destroy their bodies and leave them to die a horrific and suffocating death.

SARL DOTTEN

**R**ecent studies show that the occurrence of Pneumococcosis, or Black Lung disease, among coal miners across the Nation has skyrocketed beyond anything ever seen before in the industry.

Younger, less experienced miners are contracting the disease at an earlier age, subjecting them to a shortened and debilitating existence until they ultimately succumb to the ravages of the illness.

**As Miners are Contracting Black Lung at Historic Rates Mine Operators and the Government Act Surprised**

Data from Black Lung Clinics across Appalachia, reported by National Public Radio (NPR) and studies by the National Institute for Occupational Safety and Health (NIOSH) have all come to the same conclusion. The occurrence of Pneumococcosis and Complicated Massive Pulmonary Fibrosis is being diagnosed in unprecedented numbers across the region. Perhaps even more alarming, is that many of the individuals contracting the disease are younger miners with less than 20 years of mining experience.

The information obtained from eleven Black Lung Clinics in Pennsylvania, West Virginia, Virginia and Ohio discovered 962 cases of the ►

**Protection**

"This is an industry that, left to its own devices, has no regard for the health and safety of the men and women who mine the coal and made them their fortunes. They regard these individuals as just another cog in the machine," said President Roberts. "In the early part of the 20<sup>th</sup> century, mine operators made it clear that they had more concern for the mules they bought than the miners they hired. Today, they worry about buying a mining machine in a rockfall or losing production on the longwall. But the life and health of the miner is not a priority.

Mining has changed greatly over the past century, unfortunately, the attitude of mine operators has not. There is only one way to fix these terrible circumstances: if miners want protection, if they need to be sure their life is valued, if they want to live their retirement years with some sense of dignity, they need to join the Union."

**legislation**

disease from 2010 to 2015. This is nearly ten times the number of cases reported by NIOSH during those five years. NPR also stressed that the frequency rate could be even higher because some clinics had incomplete records and other clinics refused to provide information.

"The government can claim they are doing all they can to reduce miners' exposure to coal mine dust and operators can argue the industry isn't at fault, but there is clearly a problem here," stated President Roberts. "There is only one way miners get Black Lung disease. They are breathing air that contains excessive amounts of respirable coal dust. Having stated the obvious, it becomes clear that the law is not being properly enforced or mine operators are not following mandatory health and safety standards or both. There is no other explanation. When enforcement does not exist and operators are permitted to police themselves, miners die. This is not hype and it is not overreaction, I am simply stating the facts. Now, we need to stop talking about how we got here or why we are here and find the solution. Miners are dying."

**Ignoring History does have Consequences**

The history of Black Lung disease, like many industrial illnesses workers have faced throughout their careers, is rooted in the mischaracterization, denials and lies of the powerful corporate barons who own and operate the mines, mills and factories.

For victims of Pneumoconiosis, the story started with the denials that the disease even existed. For over one hundred years, as miners died from their exposure to coal mine dust, the operator refused to acknowledge the problem. When it became apparent to the public that miners were suffering from abnormally high numbers of chronic lung conditions, mine operators attempted to extoll the vir-

The National Institute for Occupational Safety and Health (NIOSH) has been on the cutting edge of Black Lung research and diagnostics. The NIOSH x-ray van travels the Country offering free x-rays to coal miners.



In the late 1970's, miners from across the United States rallied in McPherson Square in downtown Washington, DC in support of the Nation's first federal Black Lung legislation.

tues of the symptoms, claiming that the choking and coughing would actually clear the miners' lungs and keep them healthy. Company doctors, hired and paid for by the operators, even claimed it was healthy for miners to breath coal dust. Finally, when there was no recourse but to accept the medical reality that miners were dying because of the dusty environment they were forced to work in, mine operators laid the blame at the feet of the miners.

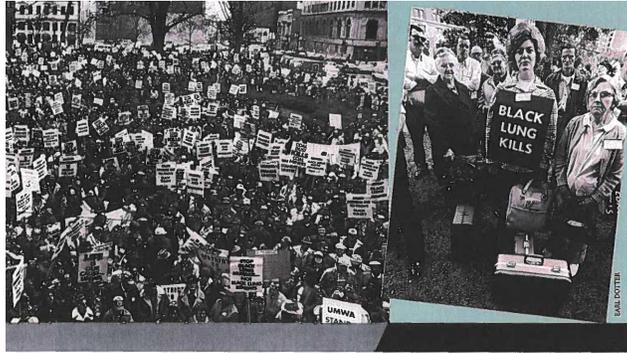
In the eyes of the coal barons, the miners who are slowly suffocating from this insidious disease are lying about their condition to collect benefits they do not deserve. In a shameful twist, the coal operators have put all their energy into playing the victim. They have spent almost 200 years blaming everyone else for the conditions that miners suffer. The resurgence of the disease in recent years has not changed the operators or their trade associations' misinformation campaign.

**From Mine Operators to the NMA, it's the Miners Fault or Miners are Liars**

The most recent tact by mine operators and the National Mining

Association (NMA) ring ominously familiar to the past. The latest iteration of the miners' lung problems is a rare and debilitating disease known as Idiopathic Pulmonary Fibrosis (IPF). Despite the fact that the cause of IPF is unknown and that it effects people over the age of 55 almost exclusively, it is the latest attempt by the industry to distance itself from exposing miners to excessive coal dust. The fact that almost every one of the estimated 42,000 individuals who will be diagnosed with IPF this year will be over the age of 65 and have no connection to coal mining does not stop the industry propaganda machine.

The industry also relies on the decades-old idea that smoking is the culprit. But according to Dr. David Blackley, head of Respiratory Disease Studies at the National Institute for Occupational Safety and Health, [Black Lung] is "...an incurable disease caused by inhalation of coal



representation

dust... it is not caused by smoking" and "... is easy to distinguish with x-rays." However, industry apologists still use the old familiar tactics despite medical evidence to the contrary. Bruce Watzman, head of Regulatory Affairs for the NMA, reiterated the tired old lie about the disease. He noted that based on, "... discussions with those who administer this program for [coal] companies... more often than not, we are called to provide compensation for previous or current smokers."

"Miners have been mining coal to power this Country for more than 200 years, which is just as long as mine operators have been lying about Black Lung disease," said Secretary-Treasurer Allen.

"No matter what the circumstance; inadequate ventilation, excessive dust, a mine explosion or in this case miners suffering from Black Lung disease, mine operators never accept any responsibility for their actions.

The excuses never seem to end. More than 100,000 miners have been killed in this industry and over 100,000 more have suffocated to death from

Pneumoconiosis, but I have never met a coal operator who has offered anything but excuses and used tainted evidence by company paid physicians to place blame elsewhere. The stories never change; a miner dies in an accident or succumbs to black lung, the coal operator blames the miner or claims it was an act of God and forgets the miner ever lived, let alone worked for the company. It's a sad situation that just keeps playing over and over."

**After a Miner Contracts the Disease, the Lying and Dishonesty Really Begins**

There are countless stories of miners who have contracted the most severe form of Black Lung disease, Massive Pulmonary Fibrosis (MPF). These miners are examined by medical experts from the U.S. Department of Labor and their own doctor to confirm their worst fears only to be denied benefits by their employer. The truth is, almost without exception, and despite overwhelming evidence to the contrary, coal operators still refuse to recognize the miners' dis-

ability and drag them through years of court proceedings. The premise behind the operator's decision to deny benefits is simple. The delaying effort allows them to rely on time and money, two things most miners with the disease don't have.

The expense of pursuing the claim can cost the miner tens of thousands of dollars they simply do not have and most lawyers familiar with the Black Lung legal system know the return on their investment in time and research is meager at best. So, after an initial filing and a series of hearings before the administrative law judge, most miners cannot afford to continue the fight. The case is dropped, the company wins and the miner suffers in obscurity until the disease causes their lungs to fill with liquid and they drown. ▶

dust

Should a miner have enough resources to continue the benefit fight, the employer's legal team relies on the passage of time to settle the case. Miners with MPF have a limited time left on this earth. Through court hearings, delays, appeals and any number of stalling tactics, the miners' time is slowly drained away as the case languishes in the system. Ultimately, the miner will suffocate and die. But, for the mine operator and his legal team, the case is over and no benefits are paid. It's a win no matter what the cost in human tragedy!

Unfortunately, the truth about these despicable tactics by mine operators and the law firms they hire with the profits from the miners' labor is that, they work.

#### A Special Place In Hell

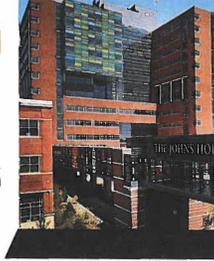
The intervention and deceitful dealings of the lawyers, and in many instances the less than truthful medical personnel they hire to do the companies' bidding, must also be taken into account. While miners, their lawyers and the UMWA have always suspected that an unethical and unholy alliance came together and would resort to whatever means necessary to defeat the miners claim for benefits, the fact is, there is evidence to support the claim.

The case in point deals with one of the largest legal firms representing coal companies, Jackson Kelly, PLLC and one of the most prestigious medical institutions in the Nation, Johns Hopkins University Medical Center. The two institutions know each other well, they have worked together on Black Lung cases for decades. Their collaboration and interaction with coal operators around the Country have been extremely damaging to miners seeking compensation for the illness that is ravaging their bodies and destroying their lives.

#### Jackson Kelly, PLLC

For Jackson Kelly, their nearly two centuries of catering to the coal industry has made them the go-to law firm for the giants in the business. The firm's aggressive and ruthless approach to defending their coal industry clients is apparent, but a report by the Center for Public Integrity (the Center) raises serious ethical questions about the firm's tactics. In a very limited review of cases handled by Jackson Kelly, the Center found at least eleven cases that the firm was "...found to have withheld potentially relevant evidence [of Black Lung] and, in six cases, the firm offered to pay the claim rather than turn over documents as ordered by a judge." In one case in particular, a miner underwent a biopsy to determine if he was suffering from lung cancer. The tissue was examined by a pathologist and was ruled negative for the disease. However, without the knowledge of the miner, Jackson Kelly obtained the medical slides of the biopsy and sent it to two pathologists the firm commonly contracted with. Both reported that the tissue from the biopsy was likely complicated Black Lung disease. The report, which only Jackson Kelly had, was suppressed, hidden away and never shared with the miner, his doctor or his attorney at trial. The miner's benefits were denied.

The report also discovered that, according to Jackson Kelly's own documents, the firm has a history of withholding evidence that is unfavorable to its clients and "...shaped the opinions of its reviewing doctors by providing only what they wanted them to see." The firm claims that they are not required to disclose such information because it is "attorney work product." Meanwhile, as miners continue to suffer and die from the incurable effects of the disease, Jackson Kelly continues to defend the practice. In court filings, Counsel for the firm noted, "...there



Johns Hopkins Medical Center ran a Black Lung program for more than four decades. Prior to shutting the program down its director, Dr. Paul Wheeler, examined 1,500 x-rays of miners' lungs. He never once diagnosed a case of complicated Black Lung disease.

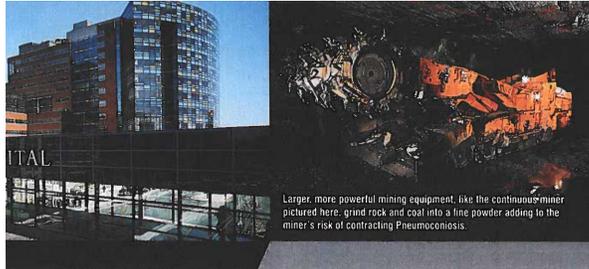
is nothing wrong with its approach and that its proper role is to submit evidence most favorable to its clients." In the end, truth be damned, miners are collateral damage in the industry and Jackson Kelly must win no matter what the cost.

#### Johns Hopkins

A small unit of radiologists in one of the Nation's most prestigious medical schools has been doing the bidding of coal companies in their attempts to deny miners' Black Lung claims for decades. For 40 years, these medical professionals at Johns Hopkins Medical Center have reviewed x-rays of miners suffering from Black Lung disease. Almost without exception, these individuals, whose x-ray interpretations cost up to 10 times the rate typically paid for such services, have never diagnosed the most severe form of the disease, Massive Pulmonary Fibrosis.

To get the full picture of the impact that Johns Hopkins Black Lung program has had on miners across the country, you need only look at the work of one man who ran the operation for the hospital, Dr. Paul

save lives!



Larger, more powerful mining equipment, like the continuous miner pictured here, grind rock and coal into a fine powder adding to the miner's risk of contracting Pneumoconiosis.

union

Wheeler. Wheeler, who retired after the story by the Center was printed and the hospital terminated its Black Lung program, was considered by many to be a leading authority on lung disease. With a medical degree from Harvard University and the prestige associated with Hopkins Medical Center, judges took his evaluations of patients as gospel. Some sided with the coal company's medical professional because he [Wheeler] is, "...the best qualified radiologist" and stating their decisions were because of Wheeler's testimony noting, "I defer to Dr. Wheeler's interpretation because of his superior credentials."

But, a deeper look into Wheeler's expertise revealed some alarming problems. The Center's reporting found that, "In more than 1,500 cases decided since 2000 in which Wheeler read at least one x-ray, he never found the severe form of the disease, complicated coal workers' Pneumoconiosis." However, in more than 100 of the cases Wheeler determined to be negative, biopsies and autopsies provided indisputable evidence of Black Lung.

The doctor may have many reasons for his findings, beyond the fact that coal companies are the client. His own words seem to indicate as much. For whatever reason, he

believes miners don't have Black Lung and are being wrongfully compensated. He stated, "They're getting payment for a disease that they're claiming is some other disease." Wheeler generally blamed miners' lung problems on tuberculosis or histoplasmosis (an illness caused by a fungus in bat and bird droppings). His arrogance, however, does not end there. He has made it clear that despite what the law says, miners should be required to prove the existence of Black Lung. When confronted with his misinterpretation of the law, Wheeler's contempt reached a new level when he stated, "I don't care about the law."

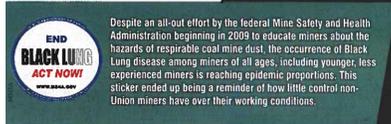
The story by the Center was an enlightening look into the less than

honorable and sometimes unethical levels coal operators and their surrogates will go to in order to win. Miners stand little chance of proving their case when the odds are so heavily stacked in favor of big business and bigger money. The tragedy lives on until the miner finally dies, but the "professionals" who oppose them go home to comfort and with another notch in their belt.

#### Troubles with the Black Lung Trust Fund Continue

In the end, miners or their spouses who are fortunate enough to navigate through the system and receive the benefits they are owed are now facing another hurdle. Many whose employers are no longer in busi-▶

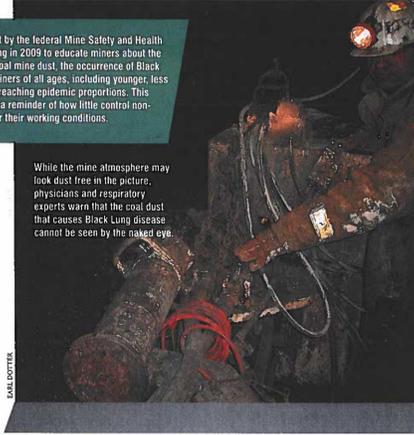
"For some people who are rich, their toughest job in life is probating their parents' will and demanding another tax cut from the government. For those who are not, it is a life of hard work and struggle," said President Roberts. "The United Mine Workers of America was not created through the benevolence of the rich and powerful. We are the sons and daughters of fighters. We have taken from the tyrants of industry and the wealthy what is rightfully ours, and we fully intend to keep all of it. Some people will do anything for money, but there is a special place reserved for them. They may have many lawyers and doctors willing to do whatever it takes to cheat the injured and sick out of what is rightfully theirs, but we will not stand by and let it happen. It is time to get off the couch and hit the streets. We are going to win this Black Lung fight like we have won all the others by marching and agitating and fighting."



ness or whose employer refuses to pay are placed in the Black Lung Disability Trust Fund (Trust Fund). The Trust Fund, which was created in 1978, is funded by a tax on coal produced and sold domestically. Currently this coal severance tax amounts to \$1.10 per ton for underground coal and \$.55 per ton for surface coal. Revenues generated by the tax have rarely been sufficient to fully finance the Trust Fund, and as of 2017 it was running a multi-billion-dollar deficit. That situation will only become worse in January of 2019 when a scheduled 55 percent reduction in the coal tax is scheduled to kick in.

The bottom line is that permitting the revenues to decrease threatens the overall stability of the Trust Fund. Miners and their families who receive payments between \$650.00 and \$1,300 a month, depending on the number of dependents in the family, could not only see these minimal payments dry up, but the medical assistance they need to survive would also be eliminated. While many of our friends in Congress, including Bobby Scott (D-VA), Richard Neal (D-MA) and Sander Levin (D-MI) are seeking ways to correct the problem, coal industry lobbyists are pushing just as hard to reduce their liability and give a tax break to the coal operators.

The situation for these families is untenable. Staring at a challenging and limited future from a health standpoint, they must now face the uncertainty posed by the potential loss of benefits. The stress and worry only adds to an already unbearable situation.



While the mine atmosphere may look dust free in the picture, physicians and respiratory experts warn that the coal dust that causes Black Lung disease cannot be seen by the naked eye.

KALE SPITZER

#### There is only one solution – Fight

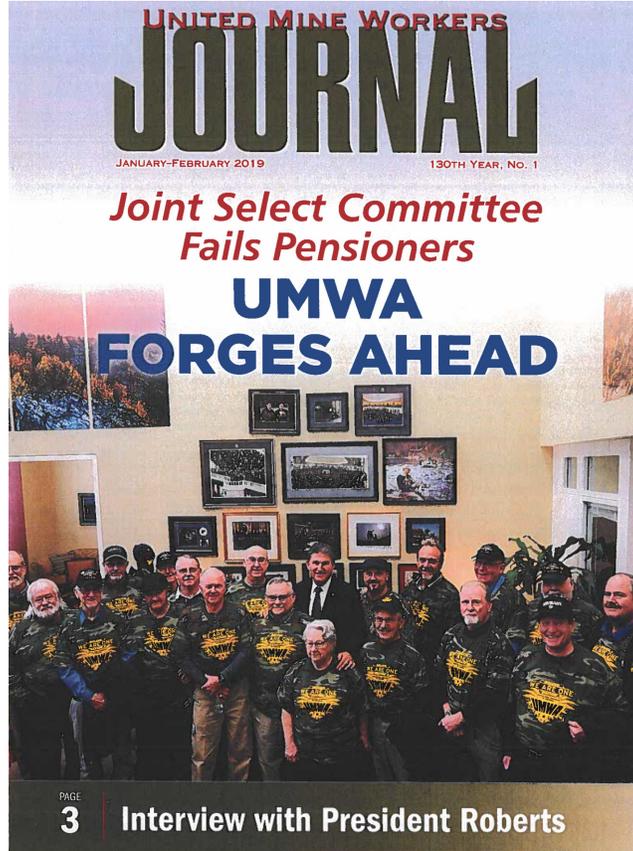
"The legacy of the mining industry is one of tragedy and despair. For more than a hundred years miners and their families were treated with disdain and contempt by coal operators and the government," stated President Roberts. "It wasn't until the Union was firmly established that miners' lives were transformed from slaves to the coal barons to middle-class members of society. Company houses and company stores were eliminated. The company doctors and preachers were finally run out of town and miners were free to enjoy the full benefits of citizenship. The Union ushered in higher wages, medical benefits, retirement security and programs that compensated those who suffered injury and illness because of the labor they performed. Miners have proven their loyalty and patriotism to their Country in many

different forms. They have worked for every penny and benefit they receive. We are not about to let anyone take away what these men and women have earned. The UMWA was born out of struggle, fighting to protect the American working class. There is no retreat on these issues. The struggle is before us, and we will meet the challenges just as our forebearers did. There is only one way to keep what is ours – FIGHT. That is exactly what we will do to protect these families."

On June 6, 2018, President Roberts spoke at the National Black Lung Conference in Pipestem, West Virginia. His message was loud, clear and without hesitation. "The UMWA, along with the Black Lung Association and Clinics refuse to allow the surge of Black Lung disease to continue. The pain, suffering and inevitable death of miners with this disease must stop. In the words of Mother Jones, we must pray for the dead and fight like hell for the living." ■

one solution

## **Attachment 12**





# Black Lung Cases Skyrocket

A miner is tested for the presence of Pneumoconiosis at a Clinic in West Virginia. The occurrence of this disease is greater today than it was when the Coal Act was passed in 1969.

According to a report published in the September 2018, edition of the *American Journal of Public Health*, the National Institute for Occupational Safety and Health (NIOSH or Agency), one in every ten coal miners who have worked for at least 25 years in the industry has been identified as suffering from Pneumoconiosis or Black Lung disease. The situation in West Virginia, Kentucky and Virginia is much worse. NIOSH data has determined that one in five miners with two and a half decades mining experience in central Appalachia have contracted some level of the disease. The Agency also noted that the number of miners diagnosed with progressive massive fibrosis (PMF), the most severe form of the disease, will likely increase at the same rate in the coming years.

"The situation facing miners diagnosed with Black Lung disease has always been bleak," stated President Roberts. "The fact is, there is no cure for Black Lung, so a miner diagnosed with the disease will see their health continue to slowly deteriorate until they can no longer walk across a room or lay flat in their bed. Eventually, they will die a cruel and hideous death by suffocation. It is becoming more and more apparent that despite all the progress we thought was made to control dust levels in the

mines since the Coal Act was passed in 1969, the disease has not been eradicated. In fact, these studies show the disease is worse than ever before. Without aggressive and impartial enforcement, the scourge of Black Lung is destined to continue."

Roberts continued, "It is not a coincidence that the vast majority of these new cases of the disease have been diagnosed in miners working at non-Union operations across the country. The United Mine Workers of America has been fighting for the health and safety of mine workers for more than 129 years and we are certain our presence at these operations would dramatically reduce the occurrence of the disease. It is clear that with the number of new cases of Black Lung being diagnosed reaching historic levels, action must be taken to determine the root causes of this epidemic and correct this public health crisis. The UMWA is ready to fill that void and help reverse this horrific trend."

Today, Black Lung rates in the United States are higher than the ones that forced Congress to pass the Coal Mine Safety and Health Act of

1969, that set maximum dust levels permitted in the Nation's mines. To put this health crisis in perspective, the number of cases of Black Lung diagnosed through 2016 in West Virginia and Kentucky have increased over 16 percent compared to 1970. In Virginia, the same year comparison shows an increase of over 31 percent. Doctors from the National Institute for Occupational Safety and Health have described the incidence rates as nothing short of an epidemic.

### Black Lung Disability Trust Fund Recipients Face Uncertain Future

December 18, 2018, was a significant day in the lives of coal miners who are already afflicted by Black Lung and current miners who may contract the disease. The date, which many miners may be unaware of, was actually established by Congress in 1981 as the day the excise tax placed on every ton of coal produced in the United States would be reduced by 55 percent. This tax is used by the federal government to provide the revenue necessary to operate the federal Black

The implementation of larger more powerful mining equipment, which pulverizes coal and rock into a fine dust, is at least partially to blame for the increase in Black Lung disease. The disease is especially prevalent among non-Union miners.





The National Institute for Occupational Safety and Health (NIOSH) travels the Country screening miners for Black Lung disease. NIOSH has just released a report stating that 1 in 5 miners in central Appalachia has some level of Black Lung disease.

Lung Disability Trust Fund (Trust or Fund). Congress set this arbitrary deadline in 1985 believing that Black Lung would be eradicated before the coal excise tax expired in 2018.

Prior to the expiration of the Coal Excise Tax, operators paid \$1.10 on coal produced underground and \$.55 on surface coal. According to the Congressional Budget Office (CBO), had the Tax been extended, the Trust Fund's current \$6 billion debt would have been reduced to \$4.5 billion by 2050. An increase of \$.25 per ton of coal would have eliminated the debt altogether. The CBO has determined that allowing the tax to expire, as Congress did in December, will allow the debt to explode and require a multimillion-dollar taxpayer bailout to prop up the Trust Fund.

Surface miners are also affected by the higher incident rates currently being diagnosed among miners in the Nation's coalfields.

"No matter how far we seem to come in this Country, whether it is advances in science, technology, medicine or a host of other subjects, some things never seem to change," said Secretary-Treasurer Allen. "I suppose many industries deny the problems they cause, but the people who own and operate coal mines seem to be the worst. They all argue that they should be allowed to make as much money as possible on their investment without government interference. Then when their actions cause major economic or health

problems, they want the government to force taxpayers to bail them out. That is exactly what happened in the aftermath of the recession of 2008 and that is what coal operators are asking for now. They want to keep their profits private but socialize their losses. It is time for Congress to tell these businesses they are responsible to pay, not the American taxpayer."

**With a Crisis on the Horizon, Kentucky Punishes Workers**

On March 30, 2018, Kentucky's Republican Governor signed House Bill 2 which was passed earlier in the year by the Republican controlled Legislature. The bill stops workers' compensation payments, including Black Lung benefits, after 15 years from the time the sick or injured worker begins receiving compensation. But after learning about the alarming increase in the occurrences of Black Lung disease among current and much younger miners, the Legislature used HB-2 to further protect the industry. In response to industry lobbying, they barred radiologists and physicians who are certified B-readers from reading and making determinations on miners' chest x-rays. B-readers are physicians certified by the National Institute for Occupational Safety and Health as demonstrating proficiency in classifying x-rays for pneumoconiosis. As a result of the new law, there are only four doctors in the state certified to read miners' chest x-rays and determine if miners have Black Lung – three of these physicians are coal industry consultants.

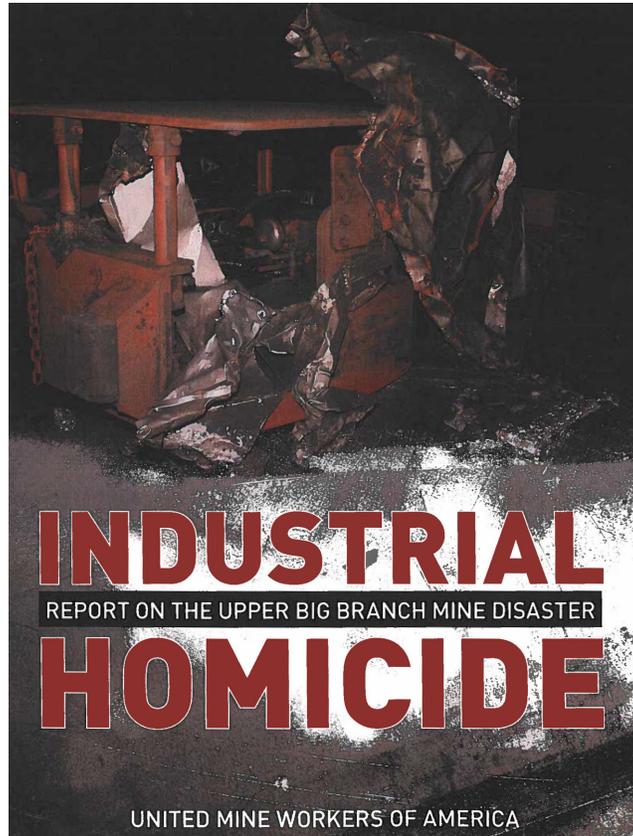
"The inaction by the United States Congress and the action by the state of Kentucky are absolutely unbelievable," stated President Roberts. "It is a failure of courage for Congress to refuse to take the action necessary to help sustain the Federal Black Lung Disability Trust Fund by changing a date set over three decades ago. As for the Kentucky Legislature, it is obvious that they have determined who they are beholden to, and it is not the workers or voters of the state. It is impossible to look at these two decisions and not see that some of our elected representatives have clearly chosen sides in this matter. Unfortunately, they have chosen to stand with their wealthy donors and cast sick and injured workers aside. I don't know how they can look at themselves in the mirror or sleep at night. They must be held accountable for the human suffering they are causing. This is unconscionable."

Senator Joe Manchin (D-WV) has introduced Senate Bill 27 that would restore funding to 2018 levels. ■

Dr. Robert Cohen, Professor of Medicine and Director of Occupational Lung Disease at Northwestern University's Feinberg School of Medicine is not only alarmed by the surge in Black Lung disease, but by the decision by Congress to let funding lapse for disabled miners.



## **Attachment 13**



shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan contents as prescribed in §75.371 and the ventilation map with information prescribed in §75.372.”

Massey was cited 47 times for violating §75.370 since January 2009. Ventilation plans are precise documents describing the layout of the mine and what will be necessary to ensure adequate air is supplied to mining sections and all other areas of the mine. The written details of the plan are necessary for the Agency to ensure the mine operator complies with the law. More importantly, they are necessary so miners know that the conditions they are required to work under are maintained in a manner that protects their health and safety.

None of these 47 citations and orders can be considered incidental or minor infractions. The violations all materially affected the health and safety conditions for miners at the operation. Some are simply more egregious than others, but collectively they demonstrate the obvious disregard management had for the law and the lives of its own miners.

Order number 8090855, issued June 17, 2009, states in part, “The operator is failing to comply with page 5 of the approved ventilation plan... The miner man is standing in the visible dust in the return of the continuous miner. *The section foreman stated he was aware of the condition.... and failed to take action to correct it”* (emphasis added).

Order number 8090856, issued June 17, 2009, states in part, “The operator failed to comply with the approved methane/dust control plan... The miner operator was standing in visible dust... *The section foreman stated to MSHA that he was aware of the conditions”* (emphasis added).

These orders not only reveal unhealthy and illegal conditions, but also appear to represent routine occurrences at UBB. Visible dust in the mine atmosphere can be the result of several factors, with inadequate ventilation the most likely in this case. Secondly, the foreman was aware of the condition but allowed it to continue. This demonstrates such mining practices were common and tolerated by Massey Energy. Based on the investigation, the Union suggests such practices were part of the normal operating procedures imposed by Massey on the workers.

The fact that miners worked in such a dusty atmosphere offers great insight into the presence of black lung disease detected in many of the miners killed in the disaster. Of the 24 miners between the ages of 25 and 61 whose lungs could be examined during autopsy, 17, or 71 percent, showed some stage of black lung disease.

Massey was aware of conditions in the mine and expected miners to continue to work in those conditions. The refusal of management to deal with the ventilation problems is reflected in many of MSHA's citations. Some of the bigger problems are listed below.

Order number 6612934, issued on September 1, 2009, states in part, “The operator failed to follow an approved ventilation revision....The

## Two sets of books

In all instances, information about conditions within the mine must be available to all interested parties at the mine. However, Massey Energy regularly disregarded these requirements by keeping two sets of books.

On June 29, 2011, MSHA released six pages from these books, three from the official record books and three from Massey's production and maintenance books (attached). The entries are dated March 1, 2 and 16, 2010. The official reports do not indicate anything of consequence, no hazards or unusual events. These are the records that Massey made available to the inspectors and others on the property, including the miners themselves.

However, the mine's production and maintenance books tell a much different story. As noted above, the report for March 1, 2010, reads, "Added 5 gal oil to the T/E ranging arm. Had no water on either drum, cleaned several and stopped right back up, removed 8 on each end, ran like that rest of shift to try and flush drums, told 3<sup>rd</sup> shift."

Running the shearer with no water sprays, as would be the case here, is a serious violation. Obviously, this would be a violation of the ventilation plan and because it was done knowingly, this action demonstrates a reckless disregard for the law. More importantly, the action places the miners on the section at immediate risk for an ignition of gas or dust accumulating on the coal face. And over the long term, exposure to uncontrolled coal mine dust greatly increases miners' chances of contracting black lung disease.

The production maintenance book for March 2 states, "25 min Reventelating [sic] to get methane out of #3 1.5 Reduced to .30."

The production maintenance book for March 16 notes, "Low Air in LOB outby going to HG22 Tail open 7:00-8:10.... Adverse Roof condition their coal streak four ?5' up. Falling out to in # 1 2."

Since these incidents were not recorded in the official record book, there was no way for the oncoming shift to know that these hazards existed. Miners entering the mine would be absolutely unaware of potentially dangerous conditions present when they arrived on the section. Further, when MSHA reviewed the "official" books, it would not get any sense of what conditions were actually like in the mine.

The Mine Act requires operators to examine the entire mine at regular intervals. The scope and timing of the examination is determined by the particular examination being performed. Required examinations are listed in 30 CFR Subpart D - Ventilation, previously referred to in this report.

The results of these examinations are required to be recorded in an official record book designated for that purpose, signed or initialed by the person making the examination and countersigned by the mine foreman or equivalent company official. The report must contain a record of hazardous conditions and their locations found by the examiner during each examination and of the results and locations of air and methane measurements.

## **Attachment 14**

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**GAO**

United States Government Accountability Office

Report to the Chairman, Subcommittee  
on Health Care, Committee on Finance,  
U.S. Senate

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October 2009

## **BLACK LUNG BENEFITS PROGRAM**

**Administrative and  
Structural Changes  
Could Improve  
Miners' Ability to  
Pursue Claims**



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GAO-10-7

October 2009

**BLACK LUNG BENEFITS PROGRAM****Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims**

Highlights of GAO-10-7, a report to the Chairman, Subcommittee on Health Care, Committee on Finance, U.S. Senate

**Why GAO Did This Study**

The Department of Labor (DOL) Black Lung Benefits Program provides medical and income assistance to coal miners who suffer total disability or death due to lung disease caused by coal dust. To provide insight into DOL's administration of the Black Lung Benefits Program, GAO is reporting on (1) how long it takes to process and resolve black lung benefits claims; (2) at what rate and for what reasons black lung claims and appeals are denied by DOL; and (3) what barriers, if any, confront miners or their survivors in pursuing their claims. GAO collected and analyzed black lung claims and appeals data and interviewed officials at relevant federal agencies, national organizations, and selected local organizations at two sites.

**What GAO Recommends**

GAO recommends that DOL implement several administrative changes, including creating a measure to improve the agency's ability to track performance and improving the DOL form used to document claimant medical evaluations. GAO also recommends that DOL evaluate the potential for proposing, to Congress, several structural changes to the program, including strategies for increasing claimant representation and improving requirements for documenting evidence. DOL agreed with most of the recommendations and will begin to evaluate potential structural changes, but disagreed that DOL should track performance through the claims and appeals process.

View GAO-10-7 or key components. For more information, contact Andrew Sherrill at (202) 512-7215 or [sherrilla@gao.gov](mailto:sherrilla@gao.gov).

**What GAO Found**

In fiscal year 2008, DOL issued decisions on claims in less than 1 year on average at each stage of adjudication, yet according to officials and experts, the appeals and remands (claims sent back to the prior stage of review for further consideration or development) that follow decisions can keep claims in the system for years. Although DOL does not track how long all claims remain in the claims and appeals process, we examined 763 miner claims filed between 2001 and 2008 that were ultimately awarded benefits by mine companies. We found that nine companies agreed to pay benefits for about 73 percent of these claims within 3 years from the date of the initial claim, roughly 24 percent of claims in 3 to 6 years, and the remaining 4 percent in 6 to 8 years. The program also contains financial incentives for both miners and mining companies to keep claims in the appeals process. For example, some miners may extend the appeals process to maintain their payment of interim benefits. Factors that add additional time to the appeals process also include allowing time for claimants to find legal representation and waiting until there are sufficient cases in rural areas before sending a judge to hold a hearing.

In 2008, most claims (87 percent) were initially denied. Few claimants are able to prove they meet all of the program's eligibility requirements, and for certain cases, required conditions are difficult to prove. For example, some miners—those with a history of smoking—develop lung disease associated with long-term exposure to coal mine dust but which frequently cannot be detected by X-ray. Though current science does not allow a medical distinction between lung disease caused by smoking and by coal mine dust, regulations require that claimants establish that their lung disease is significantly related to or substantially aggravated by coal dust. In such cases, judges told us they rely heavily on nonclinical evidence, such as physician credentials, length of depositions, and level of sophistication of evidence presented by claimants and mine operators to determine claimant eligibility. According to some DOL administrative law judges, mining company doctors are usually better credentialed and produce lengthier and more sophisticated medical reports and evaluations.

GAO found that coal miners face a number of challenges pursuing federal black lung claims, including finding legal representation and developing sound medical evidence to support their claims. DOL officials identified miners' lack of resources, the low probability of success, and high litigation costs for their cases as factors that contribute to the difficulties miners face in finding legal representatives. Miners also encounter challenges in developing sound medical evidence. DOL administrative law judges said medical evidence prepared by DOL-approved doctors for claimants does not always provide sound or thorough evidentiary support for their claims. Further, various practices of medical testing, a key measure of black lung-related disability, may contribute to inaccurate disability test readings.

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**Abbreviations**

BRB	Benefits Review Board
COPD	Chronic Obstructive Pulmonary Disorder
CWP	Coal Workers' Pneumoconiosis
DOL	Department of Labor
HRSA	Health Resources and Services Administration
NIOSH	National Institute for Occupational Safety and Health
OALJ	Office of Administrative Law Judges
OWCP	Office of Workers' Compensation Programs
RO	responsible mine operator
UMWA	United Mine Workers of America

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United States Government Accountability Office  
Washington, DC 20548

October 30, 2009

The Honorable John D. Rockefeller IV  
Chairman  
Subcommittee on Health Care  
Committee on Finance  
United States Senate

Dear Mr. Chairman:

The Black Lung Benefits Program, created in 1969 by Congress,<sup>1</sup> provides medical treatment and monthly income assistance<sup>2</sup> to miners who can prove that they are totally disabled—unable to perform usual coal mine work due to pulmonary impairment—resulting from lung disease caused by coal dust. Their surviving dependents may also apply for compensation. Serving more than 40,000 beneficiaries and paying more than \$250 million in benefits in fiscal year 2008, the Black Lung Benefits Program remains a significant source of black lung compensation for the nation's coal miners. However, with average claim approval rates historically below 15 percent and with reports of some cases that take years to resolve, concerns have been raised about the extent to which federal black lung benefits are accessible to miners or to their survivors and dependents.

The program is administered by the Division of Coal Mine Workers' Compensation in the Office of Workers' Compensation Programs (OWCP) within the Department of Labor (DOL). Claims are processed by nine OWCP district offices, and appeals are adjudicated by two DOL agencies: the Office of Administrative Law Judges (OALJ) and the Benefits Review Board (BRB). Claimants and mine operators may further appeal these agency decisions to the federal appellate courts. Awards are funded from two sources: mine operators who are identified as the responsible employers of claimants and, when responsible employers cannot be identified, the Black Lung Disability Trust Fund. The Trust Fund, which is

<sup>1</sup>Title IV of the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. No. 91-173), as amended, 30 U.S.C. § 901, *et seq.*, commonly referred to as the Black Lung Benefits Act.

<sup>2</sup>Monthly income payments can range from \$616 to \$1,232.60 and vary by the number of dependents claimed by a miner. Black lung income payment amounts may only be offset by other state workers' compensation or other federal disability payments, which are awarded for the same disease.

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administered by OWCP, is supported through an excise tax levied on all underground coal mine operators.

To gain insight into the administration of the Black Lung Benefits Program, you asked that we determine (1) how long it takes to process and resolve black lung benefit claims; (2) at what rate and for what reasons black lung claims and appeals are denied by DOL; and (3) what barriers, if any, confront miners or their survivors in pursuing their claims.

To answer these questions, we interviewed officials from the three DOL agencies responsible for claims processing and adjudication—OWCP, OALJ, and BRB. To learn how long it takes to process and resolve black lung benefit claims, we collected and analyzed case processing data from OWCP, OALJ, and BRB. To determine the rate and reasons that OWCP denied black lung claims, we collected and analyzed data from OWCP's case management system. To determine the rate that OALJ and BRB decisions resulted in the denial of black lung claims, we reviewed OALJ and BRB appeals cases decided in fiscal year 2008 and calculated the number of denials and the total number of cases and then computed a denial rate. To determine the reasons that OALJ and BRB have denied black lung claims, we selected and analyzed random samples of OALJ and BRB cases denied in fiscal year 2008 and projected the results onto the population. We assessed OWCP, OALJ, and BRB processing and denial data for reliability. On the basis of this assessment, we concluded that the data were sufficiently reliable for the purposes of our report. To describe the barriers that miners and survivors face, we interviewed Health Resources and Services Administration (HRSA) officials to get more information about the Black Lung Clinics program, a program that provides grants to public and private nonprofit organizations to provide specialized diagnosis, treatment, benefit counseling, and outreach services to miners suffering with black lung disease. We also interviewed officials from the National Institute for Occupational Safety and Health (NIOSH) to learn about the state of science related to identifying black lung disease and its cause. We also conducted site visits to West Virginia and Kentucky, black lung-affected regions. These two sites were selected because they are (1) located in a state with a high level of black lung mortality, (2) located in an OWCP district with a high volume of black lung claims filings, and (3) identified by black lung experts as demonstrative of factors that impede or facilitate claimants' pursuit of federal black lung claims and appeals. During the site visits, we conducted a small group interview with local black lung stakeholders at each site, toured black lung clinic facilities, and met with officials from OWCP district offices responsible for adjudicating a claimant's initial claim. In addition to our site visits, we also

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interviewed spokespeople at national organizations related to black lung, including the National Mining Association, an organization that represents the mining industry, as well as the United Mine Workers of America (UMWA), a union that represents coal miners. In addition, we reviewed relevant federal statutes, regulations, administrative cases, and court cases. We conducted this performance audit from October 2008 to October 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. For additional information on our scope and methodology, see appendix I.

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## Background

According to NIOSH, coal workers' pneumoconiosis (CWP), also known as black lung disease,<sup>3</sup> has been a contributor or underlying cause of death for more than 73,800 United States workers since 1968 (see fig.1).<sup>4</sup> Following the passage of the Federal Coal Mine Health and Safety Act of 1969, which established the first comprehensive respirable dust standards for coal mines, the prevalence of black lung disease among mine workers decreased about 90 percent from 1969 to 1995. However, after 1995, the prevalence of black lung disease rose. The increase was more marked in specific parts of the country, such as the Appalachian region.<sup>5</sup> By 2006 the prevalence of black lung disease had more than doubled among underground coal miners who had worked 25 to 29 years—increasing from 3.4 percent in 1995 to 7.9 percent. The rate of black lung disease among underground coal miners with 20 to 24 years of experience increased from

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<sup>3</sup>Black lung is a term that includes coal workers' pneumoconiosis and any other chronic respiratory or pulmonary impairment arising out of coal mine employment. 30 U.S.C. 902 (b). The statistics on black lung disease included in the background section of this report refer to CWP only.

<sup>4</sup>These data were extracted from the National Occupational Respiratory Mortality System administered by the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, and the Surveillance Branch of NIOSH's Division of Respiratory Disease Studies at <http://webappa.cdc.gov/orde/norms.html> (accessed, August 3, 2009). The Web site provides data on deaths from 1968 to 2005.

<sup>5</sup>NIOSH collects information on the prevalence of black lung disease among underground coal miners through its Coal Workers' Health Surveillance Program and Enhanced Coal Workers' Health Surveillance Program. According to NIOSH, about 30 percent of underground coal miners participate in these black lung screening programs.

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2.5 percent in 1995 to 6 percent in 2006.<sup>6</sup> According to NIOSH officials, black lung disease may be occurring for a number of reasons, including weaknesses in the current coal mine dust regulations, noncompliance with those regulations, new risk factors associated with changing mining conditions, longer work hours, and missed opportunities to prevent severe disease through periodic medical screening.

According to NIOSH, significant progress has been made toward improving the health conditions in our nation's coal mines; however, with coal currently mined in 27 states<sup>7</sup> and coal mines employing an average of 117,082 workers,<sup>8</sup> coal miners continue to be at risk of developing occupational lung disease. While miners across the country remain at risk for lung disease, incidence of black lung-related deaths are more concentrated in the Appalachian region (see fig. 1), where the coal mined has high carbon content. To address these issues, the DOL's Mine Safety and Health Administration intends to publish a proposed rule to lower the coal mine dust permissible exposure limit in April 2011.

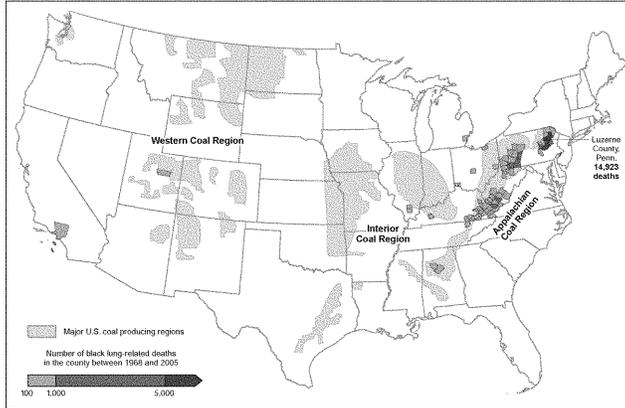
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<sup>6</sup>These percentages represent underground coal miners who participated in the Coal Workers' Health Surveillance Program.

<sup>7</sup>According to the Department of Energy, the state of Wyoming mines the most coal, followed by West Virginia, Kentucky, Pennsylvania, and Texas.

<sup>8</sup>These data reflect the number of coal mine workers in 2007. This number includes mine contractors and excludes office employees working at coal mines.

Figure 1: Deaths Related to Black Lung Disease from 1968 to 2005



Sources: Energy Information Administration's Annual Coal Report, 2007; MCHS Occupational Respiratory Disease Surveillance program.

Note: The statistics used to create this graphic only refer to CWP, not other chronic respiratory or pulmonary impairments arising out of coal mine employment.

The Black Lung Benefits Program provides medical and income assistance to coal mine workers who suffer disability or death due to black lung.

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disease.<sup>7</sup> To be eligible for black lung benefits, a coal miner must prove total disability due to pneumoconiosis (a chronic disease of the lung) arising from coal mine employment. Specifically, the miner must establish each of the following elements: (1) the miner has pneumoconiosis; (2) the lung disease arose from coal mine employment;<sup>8</sup> (3) the miner suffers from a totally disabling respiratory or lung impairment (a miner is considered totally disabled if black lung prevents him from engaging in his usual coal mine work); and (4) the miner's pneumoconiosis is a substantially contributing cause of his disability.<sup>9</sup>

If a claimant<sup>10</sup> is awarded benefits, the mine company that is determined to be the responsible employer of the miner generally must provide for the payment of benefits, either directly or through insurance. The Black Lung Disability Trust Fund pays the cost of black lung claims when no coal mine operator can be held liable for payments.<sup>11</sup> The Black Lung Disability Trust Fund is financed by coal mine companies through an excise tax. Under the Black Lung Benefits Revenue Act of 1977, each coal mine operator is required to pay an excise tax to support payment of benefits to claimants and to cover the cost of administering the program.<sup>12</sup>

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<sup>7</sup>Benefits are also provided to eligible survivors of miners whose death was due to black lung disease. 20 C.F.R. § 718.205 (2009). Federal black lung benefits are offset by state workers' compensation benefits for the same disease. If state black lung benefits are less than federal black lung benefits, then the federal black lung program covers the difference. Social Security disability benefits are also reduced by the amount of black lung benefits received. 20 C.F.R. § 725.535 (2009).

<sup>8</sup>For a miner with 10 years of coal mine employment and who suffers from CWP, there is a rebuttable presumption that the miner's lung disease resulted from coal mine employment.

<sup>9</sup>For miners who have X-ray evidence of lesions and/or scarring on their lungs greater than 1 centimeter, there is an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis.

<sup>10</sup>Claimant refers to the miner or the miner's eligible survivor. For the purposes of this report, we will use the word "claimant" to refer to both miners and the miners' eligible survivors, unless otherwise noted.

<sup>11</sup>The trust fund pays the cost of black lung claims: (1) where the miner's last coal mine employment was before January 1, 1976; (2) where no responsible coal mine operator has been identified in claims where the miner's last coal employment was after December 31, 1969; or (3) where the responsible mine operator has defaulted on the payment of such benefits.

<sup>12</sup>Until recently, the trust fund was in chronic deficit—expending more than what it collected in taxes—but the Emergency Economic Stabilization Act of 2008 (Pub. L. No. 110-343) provided an appropriation to repay a portion of the fund, and permitted DOL to restructure and retire the remaining debt.

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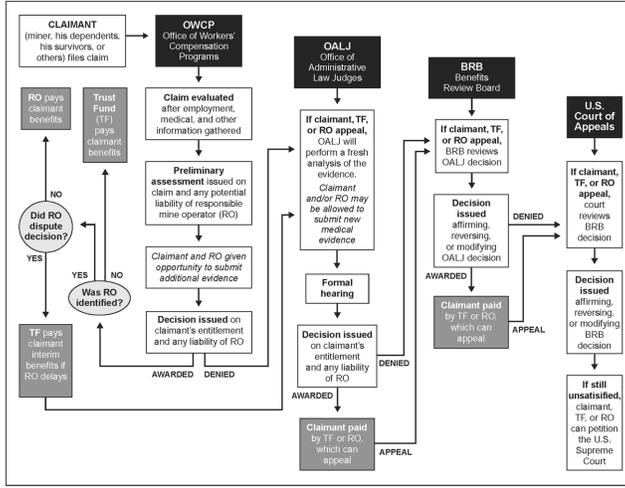
The Black Lung Benefits Program is administered by the Division of Coal Mine Workers' Compensation in OWCP. OWCP, OALJ, and BRB are three independent bodies within DOL that process claims, adjudicate cases, and issue decisions (see fig. 2).<sup>15</sup> Once OWCP issues a decision, either the claimant, responsible mine operator (RO), or Black Lung Disability Trust Fund officials can request a hearing<sup>16</sup> by OALJ. The administrative law judge provides a fresh review of the evidence and issues a decision. Any findings or conclusions by OWCP are not relevant or binding on the administrative law judge. Parties can appeal OALJ decisions to BRB, BRB decisions can be appealed to the appropriate United States Circuit Court of Appeals, and finally, Circuit Court of Appeals decisions may be appealed to the Supreme Court of the United States. Both OALJ and BRB can remand—send claims back—to lower adjudicative bodies for additional review. Cases may be remanded for procedural errors or for further development of evidence.

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<sup>15</sup>OWCP, OALJ, and BRB also administer and review claims arising under other statutes and programs, including the Longshore and Harbor Workers' Compensation Act.

<sup>16</sup>For ease of discussion, this report will refer to requests for an administrative law judge hearing as an "appeal."

Figure 2: Overview of the Black Lung Claims Adjudication Process



Source: GAO analysis of federal regulations, agency documents, and discussions with agency officials.

Notes: This figure is intended to present a basic overview of the Black Lung Benefits Program's claims process. For clarity, some steps, processes, and legal options for any party to a claim are omitted.

Modification of a claim may be requested up to one year after a decision denying benefits or by any party up to one year after the last payment of benefits.

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To ensure that claimants can properly develop evidence for their claim, DOL is required by law to give miners the opportunity to receive a complete pulmonary evaluation, which is paid for by the program.<sup>17</sup> DOL provides the miner with a list of doctors and medical facilities that DOL has authorized to perform complete pulmonary evaluations that are located in the state of the miner's residence and bordering states.<sup>18</sup> If a miner fails to undergo a required medical examination without good cause, the claim may be denied.<sup>19</sup> In addition, a miner<sup>20</sup> may submit a medical report (obtained at the miner's expense) from a personal doctor or a physician.<sup>21</sup>

In addition, mine workers afflicted with black lung disease may have access to some resources that help monitor their health and provide access to black lung benefits. For example, the Black Lung Clinics program, a federal program administered by HRSA, provides grants to 15 public and private nonprofit organizations, known as "Black Lung Clinics," which provide specialized diagnosis and treatment services, outreach, and educational programs to help patients and their families deal with the disease. Black Lung Clinic benefit counselors also help provide clients with information about additional sources of social, medical, and legal assistance, specifically on where to obtain legal representation to establish a federal black lung benefits claim. In addition, some nonprofit organizations provide resources and support for coal miners and their survivors. For example, UMWA advocates for improving coal mine health and safety laws and regulations, and the Washington and Lee University Black Lung Legal Clinic provides legal assistance to coal miners and their survivors in pursuing federal black lung benefits.

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<sup>17</sup>20 U.S.C. § 923 and 20 C.F.R. § 725.406 (2009).

<sup>18</sup>Currently, there are 177 doctors practicing in 111 different medical facilities on DOL's authorized list.

<sup>19</sup>20 C.F.R. § 725.409 (2009).

<sup>20</sup>DOL regulations also direct how claims are to be handled in the event that the miner dies of pneumoconiosis before a claim is filed. See, e.g., 20 C.F.R. § 718.104 (c) and 20 C.F.R. § 718.205 (d).

<sup>21</sup>20 C.F.R. § 725.414 (2009).

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DOL Issued Claims  
Decisions at Each  
Stage of the Process,  
on Average, in 1 Year  
or Less, but High  
Rates of Appeal and  
Remand, Among  
Other Factors, Delay  
Resolution of Many  
Claims

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DOL Issued Claims  
Decisions at Each Stage of  
the Claims Process, on  
Average, in 1 Year or Less

According to department data for fiscal year 2008, DOL decided claims at each stage of the claims process, on average, in 1 year or less, meeting its respective performance goals<sup>22</sup> (see table 1). At the initial stage of claim processing, it took an average of 205 days for OWCP to issue a decision from the date the claim was received.<sup>23</sup> OWCP receives the largest number of claims for miners or their dependents annually. At the first and second stages of appeal, OALJ averaged within 365 days to issue a decision on a claim from the date a transcript of the hearing was prepared, while BRB averaged 341 days to make a decision from the date the claim was received.

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<sup>22</sup>Performance goals vary across OWCP, OALJ, and BRB because, according to DOL officials, the goals are independently established.

<sup>23</sup>According to an independent study commissioned by DOL, in recent years OWCP has reduced the average time it takes to decide claims from 323 days in FY 2004 to 250 days in 2006.

**Table 1: Performance Data for Each Stage of Claims Processing and Adjudication in Fiscal Year 2008**

Level of claims and appeals	Total new claims	Total decisions <sup>a</sup>	Average days to issue decision	
			Performance goal	Actual performance
Office of Workers Compensation (OWCP)	4,269	4,416	220 <sup>b</sup>	205
Office of Administrative Law Judges (OALJ)	1,357 <sup>c</sup>	1,367	≤365 <sup>d</sup>	≤365
Benefits Review Board (BRB)	573 <sup>e</sup>	727	≤365	341

Source: Workload and performance data from OWCP, OALJ, and BRB, as well as from OWCP's Automated Support Package claims tracking system.

Notes: The annual number of claims received at first and second appeals tends to be less than those received at the initial claims processing stage because many claims at OWCP are withdrawn, abandoned, or awarded or denied without appeal.

<sup>a</sup>Total decisions are greater than the total number of new claims at each stage, because the total workload at each stage is not captured solely with new claims (e.g., these data only represent the new claims filed in fiscal year 2008 and do not include claims yet to be decided from previous fiscal years). For OWCP, data on pending claims from the previous fiscal year were not available. However, pending claims carried over from the previous fiscal year for OALJ and BRB are detailed below.

In addition, these data for the number of claims do not include a number of claims for which OWCP provides services for claimants currently receiving benefits (e.g., miners receiving benefits may submit a claim requesting modification of medical benefits provided).

<sup>b</sup>This performance goal is for all types of claims, including claims with and without an identified RO and claims that are withdrawn or abandoned.

<sup>c</sup>In fiscal year 2008, OALJ also had 1,938 pending claims carry-over from the previous fiscal year.

<sup>d</sup>OALJ does not calculate the average time to issue a decision on claims, but for fiscal year 2009, it established a new performance goal: that 90 percent of decisions are to be issued within 365 days from the time a hearing transcript was prepared. For this report, OALJ applied the new performance goal retroactively to fiscal year 2008 and found that about 84 percent of decisions were issued within 365 days.

<sup>e</sup>In fiscal year 2008, BRB also had 617 pending claims carry-over from the previous fiscal year.

**DOL Does Not Track How Long Claims Remain in the Process, but Some Claims Spent 3 Years or More in the Process**

DOL does not track how long all claims remain in the claims and appeals process, but we calculated that about 28 percent of the claims of miners awarded benefits from mine companies spent 3 years or more in the process. DOL officials gave the following reasons for not tracking how long claims may remain in the claims and appeals process:

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- The adjudicating bodies at each stage of the Black Lung Benefits Program's claims and appeals process maintain independence and do not share similar administrative processes or computer systems.
  - OWCP's claimant tracking system was designed, in part, to ensure that eligible claimants are ultimately paid, not to determine how long claims remain in the process.
  - Determining how long claims persist in the claims and appeals process can be challenging because it is difficult to determine what constitutes a claim's resolution. For example, claims can be appealed up to 30 or 60 days after a decision, and a modification of a claim may also be requested up to one year after a decision denying benefits or by any party up to one year after the last payment of benefits.

Given this, we chose to measure how long cases persisted in the claims and appeals process by using OWCP's data and looking only at when an identified RO agreed to pay benefits to a miner, which we believe was the best available indicator of cases that had been resolved.<sup>24</sup> Yet, this approach has some limitations as noted above.<sup>25</sup>

For the claims we examined, which were filed between 2001 and 2008, mine companies agreed to pay benefits for the majority of claims within 3 years from the date of the initial claim, while a minority of claims remained in the process for as many as 8 years before an RO agreed to pay<sup>26</sup> (see fig. 3). We only focused on those claims where a miner was

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<sup>24</sup>Using these data, our analysis could not determine whether or not further action had been requested within 1 year of the decision date. Under the program, any party (claimant or mine operator) may petition an OWCP district director for modification within 1 year of the last payment of benefits or denial of a claim, 20 C.F.R. § 725.310 (2009). Our examination did not determine whether or not a claim was modified after a RO agreed to pay benefits.

<sup>25</sup>For additional information on the analysis conducted, see appendix I.

<sup>26</sup>We also examined 3,073 claims submitted between 1982 and 2000, where a miner was ultimately awarded benefits by an RO. Mine companies agreed to pay benefits in 3 years or less for about 47 percent of claims, between 3 and 6 years for 34 percent, and between 6 and 20 or more years for roughly 19 percent of claims. However, using the data that DOL provided, we were not able to determine if, or how many, claims were subsequently modified. According to DOL officials, some claimants may have been receiving payments from an RO for several years, only then to have those payments challenged in court. For example, a claimant may have begun receiving payments from an RO in 1982, but in 2002, the mine company filed a modification alleging that they should not have been designated as the company responsible for the payment of benefits. In such a case, under our analysis, it may appear that an RO did not agree to pay benefits for 20 years.

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ultimately awarded benefits by an RO because, according to DOL officials, these claims are likely to be the most litigated.<sup>7</sup> We also focused on claims made between 2001 and 2008 because DOL officials said that several changes in the regulatory and statutory structure of the program before then negatively impacted the rate at which claims moved through the process and that major regulatory revisions implemented in 2001<sup>8</sup> heavily affected the current program's procedures. For about 73 percent of the 763 examined claims filed between 2001 and 2008, ROs agreed to pay in less than 3 years. For roughly 24 percent of the 763 claims, ROs agreed to pay within 3 to 5 years from the time the claim was filed. For the few remaining claims, about 4 percent, ROs agreed to pay within 6 to 8 years from the time a claim was filed.<sup>9</sup> However, the results of our analysis may represent a best-case scenario because some claims filed between 2001 and 2008 are still in the claims and appeals process and the length of time necessary for a RO to agree on payment could not be measured. In addition, these findings cannot be generalized to miners who were denied benefits or other types of claimants.

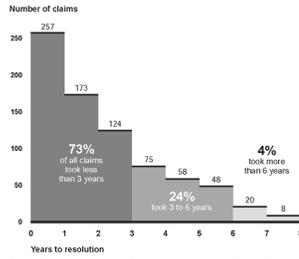
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<sup>7</sup>DOL officials said that awarded claims—where an RO is identified—are often appealed by mine companies.

<sup>8</sup>DOL officials also said that the adjudication of all claims in the program was held up for nearly a year because of a judicial stay issued in 2001. Consequently, the processing and adjudication of claims in 2001 was delayed due to circumstances beyond DOL's control. 65 *Fed. Reg.* 79920 (Dec. 20, 2000).

<sup>9</sup>If an award is contested, claimants receive interim benefits while their claims are in the appeals process. 20 C.F.R. § 725.420 (2009). However, according to DOL officials, claimants who appeal denied claims typically do not receive interim benefits.

**Figure 3: Time to Resolve Claims Filed between 2001 and 2008 for Miners Awarded Benefits from Mine Companies**



Source: GAO analysis of data from the Department of Labor's Automated Support Package claims tracking system.

Notes: Percentages may not add to 100 due to rounding. In addition, this analysis measured the time from the application date of a claim to the time an RO agreed to pay benefits as measured by OWCP's Automated Support Package claims tracking system. However, OWCP may not have received some claims for several months after the claim was originally submitted by a claimant. Moreover, according to DOL officials, the time taken for a miner to receive the first benefits payment from the RO may actually take as much as a month longer for administrative reasons. Finally, this analysis did not include miners who were denied benefits, deceased miners' widows or other dependents, or miners who were granted awards from the Black Lung Disability Trust Fund. For more information on this analysis, see appendix I.

According to DOL officials, far fewer claims end up in the appeals process now than was the case historically due to a decline in the number of claims and the fact that presently, for the majority of claims, there is no request for further action beyond OWCP's decision. According to DOL officials, on average, about 80 percent of all claims decided by OWCP annually have no requests for further action. For example, in fiscal year 2006, OWCP decided about 81 percent of all claims with no requests for further action pending after one year. In addition, DOL officials said that for a number of reasons—including a decline in the number of miners in the United States—they receive far fewer claims annually than in prior years. For example, according to data provided by DOL, in fiscal year 1985, 12,250 new claims were filed at OWCP, while there were only 4,269 new claims filed in fiscal year 2008.

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### A Significant Number of Claims Are Appealed and Many Claims Are Remanded

Although a majority of claims are resolved with OWCP, we found that a significant number of claims—approximately 20 percent—request further action, many of which are appeals to OALJ. Both miners and mine operators frequently seek appeals,<sup>30</sup> and a significant number of claims are appealed after a decision is issued by OWCP either awarding or denying benefits.<sup>31</sup> For example, in fiscal year 2008, for claims where an RO was identified and OWCP awarded benefits to a claimant, mine operators appealed OWCP's decision approximately 80 percent of the time.<sup>32</sup> In the same fiscal year, approximately 15 percent of all miners' claims denied at OWCP were appealed by miners. In addition, according to BRB officials, between fiscal years 2004 and 2008, approximately 43 percent of all claims decided by OALJ were appealed to BRB, and about 10 percent of all BRB decisions were appealed to federal appellate courts.

In addition to the significant number of claims that are appealed, many are remanded back to the prior review stage by DOL adjudicators, according to DOL officials. Officials said remands can extend appeals for less than 1 month to up to 1 year, depending on why a claim is remanded and other factors. In fiscal year 2008, BRB remanded one-third of all claims referred to it back to one of the two lower bodies, while OALJ remanded 13 percent of claims it considered back to OWCP. Claims are remanded for several reasons. At the first stage of appeal (OALJ), remands are made when evidence needs to be developed further or when the appeal is withdrawn by the litigant or dismissed by the judge.<sup>33</sup> At the second stage of appeal (BRB), remands are made to either OWCP for the resolution of issues,

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<sup>30</sup>A claim may be appealed by a miner or a miner's eligible survivors (e.g., a surviving spouse or dependent), an RO, the insurance carrier, or by a district director. 20 C.F.R. § 725.360 (2009). According to DOL officials, a third-party administrator may also appeal a claim on behalf of a mine company. Third-party administrators manage the claims process for insurance carriers or self-insured employers by providing services such as claims administration, investigation, insurance negotiations, accounting, legal, and claim loss analysis.

<sup>31</sup>DOL officials said that miners or their dependents occasionally appeal claims awarding benefits because of disputes over the size of the monetary award, the timing of payment, or other issues.

<sup>32</sup>The percentage of claims appealed for fiscal year 2008 do not include claims that were abandoned, withdrawn, or where no RO was identified.

<sup>33</sup>OALJ may also issue remands when the RO agrees to pay benefits without further litigation. In these instances, claims are sent back to OWCP for the implementation of an agreement to pay benefits.

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such as the proper development of evidence, or to the OALJ for reconsideration.

Officials at DOL offered divergent opinions on why cases were remanded. Some administrative law judges said claims are sometimes remanded to OWCP because medical evidence submitted by DOL's approved doctors was incomplete and required clarification or further development. BRB judges said claims are commonly remanded to OALJ for reconsideration because of certain legal deficiencies, such as errors in weighing evidence. However, several administrative law judges said that they believed that BRB sometimes remands claims for further review by the administrative law judge to avoid the potential review of a BRB decision by a United States Circuit Court of Appeals, and others said that in their view, certain remands are the result of BRB reweighing evidence, which is beyond the narrow scope of BRB review.<sup>24</sup> In 2007, an independent program reviewer examined the number of OALJ remands to OWCP and concluded that further study of the causes of remands could help DOL identify policies and procedures that reduce this source of delays.<sup>25</sup> No study has been conducted to determine the causes of remands by any of DOL's adjudicators back to the prior review stage, whether from adjudicatory bodies back to OWCP or from BRB to OALJ, according to DOL officials.<sup>26</sup>

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<sup>24</sup>BRB is not empowered to engage in an initial consideration of evidence or unrestricted review of a case brought before it. Pursuant to section 21(b)(3), 33 U.S.C. § 921(b)(3) of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Black Lung Act by section 422, 30 U.S.C. § 932, BRB is authorized to review the findings of fact and conclusions of law of administrative law judges in cases on appeal before it, on which the decision or order appealed from was based, and such findings may be set aside only if they are not, in the judgment of the BRB, supported by substantial evidence in the record considered as a whole or in accordance with law. 20 C.F.R. § 802.301 (2006). For example, in one case, the U.S. Court of Appeals for the Sixth Circuit held that in requiring the administrative law judge to re-evaluate the evidence, the BRB had evaluated each fact and thus exceeded the narrow scope of review, which it is accorded under 20 C.F.R. § 802.301 (2006). *Campbell v. Consolidation Coal Co.*, 811 F.2d 302 (6th Cir. 1987).

<sup>25</sup>ICF International, *Evaluation of the Efficiency and Effectiveness of the Black Lung Program* (June 13, 2007).

<sup>26</sup>OWCP officials noted that the reasons for remands to OWCP are well understood and primarily occur because claims require further development of medical evidence; therefore, no formal study was necessary for OWCP to focus on reducing this source of delays.

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**Stakeholders Say There Are Financial Incentives to Extend Appeals and Prolong the Adjudication of Claims**

The structure of the Black Lung Benefits Program creates financial incentives for claimants to appeal denials of claims. According to DOL officials, some miners extend appeals in an attempt to have interim benefits reinstated or to maintain their payment of interim benefits. Specifically, for miners whose claims are initially awarded but then appealed, the program provides interim benefit payments that cover medical expenses and a roughly \$600 to \$1,200 monthly stipend. Consequently, if an award is overturned by OALJ or BRB, the claimant has a major incentive to appeal again in an attempt to reinstate these benefits. Moreover, according to DOL officials, some sick miners never expect to win their claim by filing appeals; rather, the approach is to keep their black lung claim alive—for example, by requesting numerous continuances—until their death, with the expectation that DOL will not seek to recoup interim benefit payments from their surviving spouse or dependents.<sup>27</sup>

DOL officials also said that mine companies have financial incentives to prolong the adjudication of claims. First, according to DOL officials, mine companies often skip the initial stage of the claims process altogether and do not begin to develop a defense until the hearing before OALJ, which may delay a definitive decision. Under the program, mine companies are not required to submit evidence during initial claims processing at OWCP, and as discussed earlier, any findings or conclusions by OWCP are not relevant or binding on the administrative law judge. DOL officials said that because some claims lack merit and many claims are abandoned or withdrawn, mine companies see no need to develop a defense and submit evidence for these cases. Second, according to some administrative law judges, when mine companies do submit evidence during appeals, it is sometimes submitted after the claimant has first submitted his own evidence and just prior to a hearing. Doing so may afford the mine companies the opportunity to evaluate and most effectively counter claimants' evidence, according to some administrative law judges and claimant attorneys. Some administrative law judges said that this tactic may delay the issuance of a decision because judges may allow claimants the opportunity to develop the record after the hearing if they did not have sufficient time prior to the hearing to address the newly submitted evidence.

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<sup>27</sup>DOL officials said that it is not their practice to seek the repayment of interim benefits from the surviving family members of deceased miners ultimately denied benefits.

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OWCP officials said that a provision in a 1997 proposed rule would have addressed such delays and other concerns, by requiring parties to submit all evidence at the initial claim stage.<sup>38</sup> According to these officials, this proposed provision would have allowed OWCP to make more informed decisions up front and avoid some of the protracted and expensive appeals.<sup>39</sup> The proposal received much criticism during the public comment period and was not adopted in the final rule.<sup>40</sup> According to DOL officials, one concept from this proposal has been implemented through an administrative procedure: prior to issuing a decision on a claim, OWCP now issues a preliminary assessment concerning the claimant's eligibility for benefits based on the information gathered to that point. DOL officials said that this has helped to address mine operator concerns about the costs of developing a defense for every claim because many claimants withdraw when OWCP's preliminary assessment does not favor eligibility.

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**Some Hearings Are Delayed by the Need for Judges to Travel to Remote Locations and to Grant Claimants Additional Time to Seek Representation**

Some hearings are delayed because claimants reside in rural and remote locations. According to administrative law judges, when claimants live in remote locations, hearings are delayed until several cases can be scheduled at the same time in one region, which limits lengthy travel required of judges.<sup>41</sup> According to one Black Lung Clinic official, in some cases, scheduling hearings for miners who live in remote locations can take more than 2 years. On the other hand, when asked whether video technology—such as that employed by the Social Security Administration's Disability Determination Services—might reduce hearing delays by eliminating the need to travel, some of DOL's administrative law judges said it might accelerate hearings for miners or their dependents in rural and remote settings.

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<sup>38</sup>62 *Fed. Reg.* 3338 (Jan. 22, 1997).

<sup>39</sup>According to DOL, in fiscal year 2008, 43 percent of funds appropriated for administrative activities from the Black Lung Disability Trust Fund were provided to the Office of the Solicitor, BRB, and OALJ.

<sup>40</sup>65 *Fed. Reg.* 73920 (Dec. 20, 2000), effective January 19, 2001. According to officials, criticism centered on the following: (1) mine operators' costs to develop a defense for every claim were expensive and unnecessary, (2) limited opportunities to appeal may have violated some due process rights, and (3) unrepresented claimants may have been disadvantaged. Some officials at DOL also expressed concern that claims adjusters at OWCP may not be appropriately qualified to make decisions about the submission of evidence that would have been required under the proposal.

<sup>41</sup>To conduct hearings, administrative law judges attempt to travel to locations convenient for claimants, typically within 75 miles of a claimant's residence.

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Hearings can also be delayed because claimants lack legal representation. Administrative law judges said that in some cases, the first appearance by miners or their dependents at the OALJ hearing is without legal counsel. In such cases, administrative law judges said that it is standard practice for the judge to ask if the claimant has legal representation or if the claimant has sought representation. If a claimant needs more time to obtain legal counsel, the judge typically grants a hearing continuance.<sup>45</sup> According to OALJ, continuances may delay claims adjudication between 5 and 6 months. Administrative law judges said that it is not uncommon to grant one or two continuances to unrepresented claimants seeking counsel.

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### Most Claims Are Initially Denied, Most Often because Claimants Cannot Meet All Evidentiary Requirements

#### DOL Denies a Majority of Initial Claims and about Half of All Subsequent Appeals

Since 2001, most claims have been initially denied; and for 2008, we calculated that about half of all appeals resulted in the denial of claimant benefits. The OWCP overall denial rate for black lung claims has remained constant at around 85 percent or higher in the 8 years since the fiscal year 2001 changes to the Black Lung Benefits Program regulations. At the initial claims level, OWCP denied 87 percent of the 4,416 claims decided in fiscal year 2008 (see table 2). There was virtually no difference between the denial rates for claims filed against the DOL-managed Black Lung Disability Trust Fund (84 percent) and claims filed against mine companies (88 percent). At the first level of appeals, OALJ issued decisions that resulted in the denial of claimant benefits in more than half, or 53 percent, of the 1,367 decisions issued in fiscal year 2008.<sup>46</sup> At the

<sup>45</sup>OALJ also said that continuances are also commonly granted to develop additional medical evidence.

<sup>46</sup>OALJ awarded claimant benefits in 23 percent of its decisions in fiscal year 2008 and remanded 13 percent. The remaining 11 percent of OALJ decisions were either withdrawn by parties, dismissed, or involved decisions that were not related to the awarding of claimant benefits.

second level of appeals, BRB decisions resulted in the denial of claimant benefits in about half, or 47 percent, of the 737 appeals issued in fiscal year 2008.<sup>45</sup> Because neither OALJ nor BRB systematically track whether their decisions result in the award or denial of claimant benefits, we were only able to determine their denial rates for 1 year and were not able to determine how they have changed over time.

**Table 2: The Number of Black Lung Claims and Appeals Decisions Issued and the Percent That Resulted in Denial of Claimant Benefits in Fiscal Year 2008**

DOL agency	Number of black lung claims and appeals decisions issued	Percent of black lung decisions that resulted in the denial of claimant benefits
OWCP	4,416	87
OALJ	1,367	53
BRB	737	47

Source: GAO review of Department of Labor data.

<sup>45</sup>The BRB does not deny or award claims but affirms, reverses, modifies, or vacates the OALJ decision to grant or deny benefits to claimants.

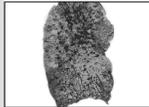
**Few Claimants Are Able to Prove They Meet All of the Program's Evidentiary Requirements**

Few claimants are able to meet all of the program's evidentiary requirements, which are set by law. In order to be eligible for black lung benefits, claimants generally must prove they have pneumoconiosis—coal-induced lung disease—that they are totally disabled as a result of it, and that the disease is caused by their mine employment. Based on DOL data, we calculated that over 60 percent of the claims adjudicated and denied by OWCP in fiscal year 2008 and estimated that over half of the claims adjudicated and denied by OALJ and BRB were denied because claimants could not prove that they had pneumoconiosis or, if they could, that pneumoconiosis had caused disability or death.<sup>36</sup> Some claimants have difficulty proving that their lung disease is pneumoconiosis.<sup>37</sup> Although a lung X-ray can detect scarring, agency officials report that claimant doctors and company physicians may each read the X-ray differently. In addition, according to NIOSH scientists, some miners develop a form of lung disease associated with long-term exposure to coal mine dust that impairs lung function but frequently cannot be detected by X-ray. Agency officials and claimant doctors we interviewed said a significant portion of black lung claimants who have this form of pneumoconiosis also have a history of smoking, which presents another evidentiary problem: while the Black Lung Benefits Program regulations require that miners prove coal dust is a significant contributing cause of their disability,<sup>38</sup> NIOSH officials reported that there is no scientific way to assign the proportion of cause to either inhalation of coal dust or tobacco smoke. Depending on the intensity and duration of exposures to coal dust and tobacco smoke, both can play a role in the impairment and disability of a miner. In such cases, judges told us that they rely heavily on nonclinical evidence to determine whether claimants are eligible for benefits. According to some administrative law judges, mining company doctors are usually better credentialed and produce lengthier, more sophisticated, and comprehensive medical reports and evaluations than claimants' doctors. For example, some claimants' doctors may only produce DOL's 4-page medical evaluation, while RO doctors will provide medical reports in excess of 20 pages supported by various citations from medical journals.

**Lung Diseases Associated with Long-Term Coal Mine Dust Exposure**



Healthy Lungs  
Source: NIOSH, 2009.



Simple Coal Workers' Pneumoconiosis  
Source: NIOSH, 2009.

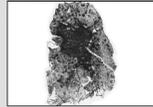
Coal mine dust can cause a range of lung diseases depending on the level of exposure. These images, taken from autopsies of deceased miners show the impact that coal dust can have on the lungs. The second image depicts lungs that have been damaged as a result of Simple Coal Workers' Pneumoconiosis (CWP). In contrast to the healthy lungs on top, the CWP lungs show mild to moderate lung scarring that may result in impaired lung function. While lung scarring is apparent in the autopsy image, the ability to detect Simple CWP in X-rays may vary by physician.

<sup>36</sup>We estimated that other claims were denied because claimants were not able to prove total disability, were not able to prove coal mine employment, or did not follow procedures for preparing claims or submitting evidence.

<sup>37</sup>By statute, there is an irrebuttable presumption of total disability due to pneumoconiosis if X-rays of a miner's lungs show a spot or lesion that is greater than 1 centimeter in diameter. 30 U.S.C. § 921.

<sup>38</sup>See 20 C.F.R. §§ 718.204(c) and 718.201 (2009).

**Lung Diseases Associated with Long-Term Coal Mine Dust Exposure**



Advanced Coal Workers' Pneumoconiosis  
Source: NIOSH, 2009.



Coal Mine-Induced Emphysema  
Source: NIOSH, 2009.

In contrast to Simple Coal Workers' Pneumoconiosis (CWP), Advanced CWP, as seen in the first image, is generally characterized by massive lung scarring and lesions, resulting in severely impaired lung function. The second image depicts Coal Mine-Induced Emphysema, which is characterized by destruction of respiratory tissues, resulting in impaired airflow through the lungs and into the bloodstream. Emphysema is one type of Chronic Obstructive Pulmonary Disease (COPD) associated with long-term coal mine dust exposure, which includes Chronic Bronchitis, among others.

Claimants who can prove they have pneumoconiosis may nevertheless be unable to establish that it is a significantly contributing cause for the condition of their lungs, if other medical conditions are present that may contribute as well. Agency officials, claimants' attorneys, and physicians with whom we spoke said claimants may also suffer from ailments such as heart disease, tuberculosis, or sarcoidosis—impairments which, like pneumoconiosis, can diminish a claimant's lung function. In cases where it is difficult to determine the cause of a claimant's disability, administrative law judges must decide whether the claimant's doctor or the mine operator's doctor has offered the most well-reasoned medical opinion. As in the case of smokers with pneumoconiosis, judges told us they rely heavily on nonclinical evidence, namely physician credentials and the length and comprehensiveness of the evidence presented by the parties.

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**Some Parties Suggest That the Black Lung Program Should Provide a Settlement Option**

Although it can be difficult for some claimants to meet all of the Black Lung Benefit Program's evidentiary standards, there is no settlement option, such as an agreement for payment of partial benefits for partial disability. Though settlement is prohibited under the current statute,<sup>60</sup> some stakeholders told us that a settlement option would increase the number of miners who would receive awards and reduce the amount of time it takes to resolve black lung claims. Still, others have said that such settlements would be incongruent with the fact that the disease is progressive. Some DOL officials told us that settlement would cause miners to settle for award amounts that would be less than what they would be eligible for once the disease progressed. Others noted that if the program permitted claimants to be paid through a lump sum settlement, instead of the current practice of receiving monthly benefit payments, miners might spend their award before they would most need it.

Other state and federal workers' compensation programs, including the Longshore and Harbor Workers' Compensation Act, do allow claimants to settle their claims or to be compensated for partial disability.<sup>61</sup> The West Virginia state workers' compensation program, among others, also provides the option for claimants to settle their black lung claim for partial disability. One claimant with whom we spoke who has been unable to resolve his federal black lung claim for 8 years was able to receive compensation for partial disability under the West Virginia workers' compensation program while still employed as a coal miner. Although this settlement option has been used in other workers' compensation programs, DOL officials—citing the prohibition in the statute—said to date, there has been no research done to evaluate the costs and benefits of offering settlement for partial disability to black lung claimants.

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<sup>60</sup>30 U.S.C. § 932 (a).

<sup>61</sup>33 U.S.C. § 933 (g) (1).

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**Coal Miners Face a  
Number of Challenges  
in Pursuing Federal  
Black Lung Benefits,  
Including Finding  
Legal Representation  
and Developing  
Sound Medical  
Evidence**

Although the Program and DOL Recognize the Importance of Legal Representation for Miners, DOL Does Not Track, Evaluate, and Report on Claimants' Access to Legal Representation

The importance of legal representation for black lung claimants is well established. The Black Lung Benefits Act recognizes the importance of claimant representation by providing reasonable fees for claimant attorneys in the successful prosecution of a claim under the statute.<sup>10</sup> DOL has recognized that the early involvement of legal representatives in claimants' cases improves the quality of evidence submitted and the decision making in all claims for benefits.<sup>11</sup> Therefore, DOL issued regulations in 2001 that provide for compensation of claimant attorneys for all reasonable time, from the outset of a case, if it ends in an award.<sup>12</sup> In a variety of ways, DOL has also encouraged black lung claimants to seek representation for the claims they initially file, as well as the claims they appeal.<sup>13</sup> For example, DOL's Web site includes a claimant resource page that provides representation guidelines for administrative appeals and identifies a number of lawyer referral services, including services with the

<sup>10</sup>A reasonable attorney fee, subject to department approval, may be collected from the RO that is ultimately found liable for the payment of benefits or, in a case in which there is no RO who is liable for the payment of benefits, from the Black Lung Disability Trust Fund. See 30 U.S.C. § 932(a). (This section of the Black Lung Benefits Act incorporates 33 U.S.C. § 928(a), the attorney fee provision of the Longshore and Harbor Workers' Compensation Act.)

<sup>11</sup>DOL regulations state that a representative can be an attorney or a nonattorney. 20 C.F.R. § 725.363 (2009).

<sup>12</sup>The regulation states that the fees payable include reasonable fees for necessary services performed prior to the creation of the adversarial relationship. 20 C.F.R. § 725.367 (2009).

<sup>13</sup>DOL regulations state that OALI does not have authority to appoint counsel or refer claimants to attorneys. 29 C.F.R. § 18.35 (2009).

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American Bar Association and legal aid clinics associated with law schools and other nonprofit organizations. On this Web page, OALJ advises claimants that DOL adjudications “vary widely in complexity and in many instances it may be wise to obtain legal counsel.” Administrative law judges also use various means to encourage claimants to seek representation. For example, some judges provide information about the advantages of representation in the Notice of Hearing, talk directly to unrepresented claimants about such advantages at the hearing, or issue a special letter to unrepresented claimants indicating that black lung cases often involve complicated legal issues and encouraging them to find representation. Finally, judges are permitted to grant claimants additional time in order for them to secure representation before a hearing.<sup>24</sup>

While DOL collects some information about claimant representation, it does not track, evaluate, or report on claimants’ access to legal representation throughout the claims and appeals process. At our request, OWCP, OALJ, and BRB provided us with the number of claimants with legal representation at each stage of the process based on data captured by their systems. However, due to limitations in data collection, these numbers were not sufficiently reliable for use in our report. For example, at the OWCP level, officials told us that some claimant representation information is captured by an automated correspondence system, separate from the main data management system, but that the correspondence system was not designed to track claimant representation and cannot identify types of representatives and at what point in the claims process a claimant acquired representation. The data management systems used by OALJ and BRB capture claimant representation data, but these data are limited by similar factors. For example, OALJ’s system cannot identify whether a representative is an attorney or lay representative and at what point in the appeals process a claimant acquired representation. In addition, BRB officials told us that their data do not include the number of all appeals filed without counsel because they do not track legal representation for appeals filed by nonprofit agencies on the behalf of black lung claimants. Further, OWCP, OALJ, and BRB officials told us that they do not report any of the representation information they collect or use it to measure performance. However, a number of DOL officials told

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<sup>24</sup>According to BRB, when an appeal is filed by a claimant without an attorney to BRB (a pro se appeal), the Board provides a complete substantial evidence review on all issues of fact and law pertinent to the administrative law judge’s decision. In many cases, this results in an administrative law judge’s denial of benefits being remanded for reconsideration of whether the claimant is entitled to benefits.

us that finding representation is a significant challenge for many claimants. For example, program officials cited claimants' lack of representation, particularly in the early stages of a claim, as a significant barrier to successful claims. OALJ officials told us that few attorneys will represent black lung claimants and that lack of legal representation limits OALJ's ability to process cases quickly.

**Disincentives for Lawyers to Take Claimants' Cases and Scarce Nonprofit Resources Impede Claimants' Ability to Secure Legal Representation**

There are few financial incentives for lawyers to take black lung claimants' cases, and claimants generally do not have the financial resources to cover the costs associated with developing the evidence needed to support and defend their claims. According to DOL officials, attorneys are not inclined to take claimants' cases due to a low probability of success. As noted previously, only 13 percent of all claims were initially approved by OWCP in fiscal year 2008. Moreover, while DOL has no official data on the final approval rate after all appeals are exhausted, black lung experts suggested that the final award rate is about half of the initial award rate. Other disincentives DOL officials and claimant attorneys cited are that the process can be lengthy and costly. For example, one attorney told us that it has taken as long as 15 years from the start of a black lung case to receive compensation for working on it.<sup>58</sup> Among the significant legal costs that claimant attorneys said they incur with black lung cases is the time spent preparing legal briefs and expenses associated with evidence development, such as preparing medical experts' reports. Because claimants lack financial resources for evidence development and DOL's payment of claimant attorneys' fees is contingent on the success of cases, claimant attorneys bear much of the legal costs during the litigation of claimants' cases.<sup>59</sup> In Black Lung Benefits Act cases, a claimant may not be charged a fee by an attorney unless black lung benefits are awarded.<sup>60</sup> While no precise estimates of legal costs for claimant cases were available, based on GAO's analysis of one law firm's estimated total legal costs for black lung cases, cases that took roughly between 2 to 4 years to resolve averaged about \$18,000 in total legal costs. This firm also indicated that it has five unresolved black lung cases that have been active 7 years or more,

<sup>58</sup>DOL regulations permit interest to be assessed for attorney's fees, computed from the date on which the attorney fee was awarded through the date the RO paid the attorney's fee. 20 C.F.R. § 725.608(c) (2009).

<sup>59</sup>If benefits are awarded, attorney's fees are paid by the mine company or the Black Lung Disability Trust Fund. 20 C.F.R. §725.366 (2009).

<sup>60</sup>20 C.F.R. §725.365 (2009).

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with an average cost of at least \$70,000 in total accrued legal costs.<sup>58</sup> In contrast to reports of limited representation available to claimants, DOL officials and representatives from claimant groups and mine companies said that mine operators tend to have greater resources to develop black lung evidence.

Various nonprofit organizations offer assistance to claimants, but their capacity to meet the legal needs of black lung claimants is limited. A prominent nonprofit legal resource for claimants is a black lung legal clinic operated by the law school at Washington and Lee University in Virginia. Currently, the clinic has 42 active black lung cases, and its operation relies largely on the voluntary efforts of law professors and their students. Officials told us that the clinic does not have the resources to provide legal assistance to a larger number of black lung claimants. Another source of nonprofit legal assistance for claimants is the federally supported Black Lung Clinics program, which primarily provides medical services. Serving 14 states, these clinics are supported by HRSA grants; they provide miners with a number of services related to the diagnosis and treatment of black lung disease. Some clinics are authorized by DOL to conduct diagnostic testing for the Black Lung Benefits Program, and clinics are encouraged by the Black Lung Clinics program to assist miners with their claims through benefit counseling and legal referral. According to program officials, four clinics receiving HRSA grants also provide claimants with free lay representation.<sup>59</sup> DOL administrative law judges told us that some lay representatives have provided miners with effective support and guidance by helping them understand the claims process and properly complete the required documentation on time. However, they noted that lay representatives are better suited to helping claimants with initial claims than with appeals, which they said generally requires formal legal training. At one time, the UMWA offered legal representation for black lung claimants, but UMWA representatives said currently that they can only refer claimants to outside legal representatives.

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<sup>58</sup>We did not independently assess the reliability of these cost estimates.

<sup>59</sup>HRSA officials could not provide us with information about grantee expenditures on lay representation because the program does not collect this information.

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**Evidentiary Documents Submitted by DOL-Approved Doctors Do Not Always Provide Sound or Thorough Support for Miner Claims**

DOL administrative law judges and claimant advocates reported that doctors who have been approved by DOL to conduct diagnostic tests and provide pulmonary evaluations do not always submit complete medical documentation.<sup>65</sup> DOL judges told us that doctors' medical opinions are a key element of evidence in claims adjudication and indicated that most of the opinions submitted by DOL's approved doctors did not provide claimants with sound evidentiary support for their cases. In particular, DOL judges told us that doctors' written opinions frequently lack clarity and specificity on the causal factors of disease and do not adequately explain their reasons for their conclusions, if at all.

While DOL has made efforts through its national and district offices to educate its approved diagnostic providers about documenting medical evidence for black lung claimants, some claimant doctors and representatives told us that the program does not consistently provide doctors with clear guidance for effectively and completely documenting their medical opinions, particularly with respect to describing the causes of disease and explaining the basis of their medical conclusions. In particular, one doctor with experience as a DOL-approved provider told us that doctors new to DOL's approved list are often unclear about how to properly document their medical opinions on DOL's medical evaluation form.<sup>66</sup>

While DOL provides supplemental guidelines for doing this, he suggested that many DOL-approved physicians are not accustomed to the comprehensive, narrative format required by DOL.<sup>67</sup> Program officials told us that the comprehensive narrative format is necessary and preferable over forms that solicit discrete responses because of the complexity of black lung disease and the importance of good reasoning in developing sound medical evidence. However, according to one doctor, the narrative portion of the pulmonary evaluation form is often left incomplete or poorly developed because of its open-ended structure. In an attempt to

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<sup>65</sup>To ensure that claimants have access to physicians who are well qualified to conduct black lung diagnostic testing and complete pulmonary evaluations, DOL issued regulations in 2001 requiring OWCP to create and maintain an official, publicly available list of department-approved medical providers. See 20 C.F.R. § 725.406 (2009).

<sup>66</sup>For DOL's medical evaluation form, see CM-988: Medical History and Examination for Coal Mine Workers' Pneumoconiosis (OMB No.: 1215-0090).

<sup>67</sup>For DOL's supplemental guidelines, see CM-988A: *Instructions for Black Lung Physical Examination*.

**Diagnostic Testing for Black Lung Disease and Associated Disability**



Source: Cook County Health and Hospitals System.

In order to determine the presence or absence of black lung disease and the degree of associated disability, miner-claimants for federal black lung benefits are required to undergo a series of diagnostic tests, including a chest X-ray, pulmonary function study (breathing tests), arterial blood gas study and a physical examination. Diagnostic tests are conducted on miners by DOL-approved physicians, and if contested, by physicians contracted by mine companies or their insurers. The clinical information reported from diagnostic testing generally constitutes a significant part of the parties' medical evidence in black lung cases.



Source: Cook County Health and Hospitals System.

improve the clarity and completeness of medical evaluations, as well as reduce the need for doctor follow-up, one DOL district office developed a supplemental questionnaire for soliciting explicit information from doctors and attached it to DOL's official medical form. According to officials at this district office, the supplemental form effectively supported their efforts in improving the quality of medical evidence documented by approved doctors. However, DOL's national office required the district office to discontinue using this supplement as a routine form because it had not been authorized through the Office of Management and Budget.

The extent to which DOL's district offices hold approved doctors accountable for the quality of submitted medical evidence is unclear because DOL does not track whether and how often district offices need to follow-up with doctors or withhold payment for inadequate medical documentation. DOL can also remove a doctor from the approved list for poor performance, including poor quality of documentation and delays in submitting reports. Since the creation of DOL's approved provider list in 2001, OWCP has removed four doctors and reinstated one. However, DOL officials told us they are reluctant to remove doctors because of challenges in maintaining an adequate number who are qualified to conduct diagnostic testing for the program. For example, in identifying recruiting challenges, DOL officials said that some doctors do not want to expose themselves to cross-examination by attorneys for the mine employers or their insurers. They also noted that certain geographic areas present difficulties for finding enough qualified doctors suitable for the approved list. Consequently, OWCP may use more liberal standards for evaluating the qualifications of doctors in these areas to ensure that claimants have access to and, where possible, a choice between approved doctors. Because of recruiting challenges, DOL officials said that they prefer to work with approved doctors to improve the quality of their documentation, rather than remove them from the approved list.

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**Blood Gas Testing Practices May Contribute to Inaccurate Disability Readings for Claimants**

Medical experts with whom we spoke told us that some practices of conducting blood gas tests, which provide evidence for claimant and RO parties, may contribute to inaccurate disability readings for claimants.<sup>63</sup> Blood gas tests are required by regulation and conducted with the miner at rest and, if medically indicated, during exercise.<sup>64</sup> According to one medical expert, inaccurate readings can result from insufficient intensity or duration of exercise, poorly executed manual blood draw, prolonged delay between blood draw and sample analysis, and improperly calibrated diagnostic equipment, among others things. DOL officials acknowledged that differences in how doctors conduct blood gas tests may influence test results. In particular, they stated that using a catheter is more reliable and, therefore, preferable to a single stick or to manually drawing blood with a syringe. However, they explained that diagnostic testing facilities in some areas may not have the capacity to carry out blood draws using indwelling catheters. They also said that, generally, they are not able to monitor or control how doctors conduct blood gas tests. DOL validates the results of all blood gas tests conducted by its approved doctors. In contrast, officials said they do not have the authority to validate or require validation of results of tests conducted by mine operator doctors.

Claimant advocates and representatives from black lung clinics we interviewed alleged that some doctors working for mine companies or their insurers conduct blood gas tests in ways that boost claimants' blood oxygen levels, thereby lowering their disability readings. Examples they provided include failing to record the pulse rate during the blood draw, not icing blood samples, shaking blood samples to aerate them prior to analysis, and allowing significant delays between drawing and analyzing blood. Program officials acknowledged that they are aware of such allegations but said they have no way to test the veracity of these claims or determine the incidence of such practices. Currently, DOL has no system for logging and tracking complaints it receives from parties to black lung cases concerning testing practices of either DOL-approved or RO-hired doctors. Mine industry representatives with whom we spoke said they are not aware of complaints or any cases of manipulation.

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<sup>63</sup>Blood gas tests measure the ability of the lungs to oxygenate blood and are an indication of the level of a claimant's impairment.

<sup>64</sup>20 C.F.R. § 718.105 (2009).

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**Conclusions**

The Black Lung Benefits Program remains a significant source of black lung compensation for the nation's coal miners, but there are a number of administrative and structural problems that could impede the ability of eligible miners to pursue claims. First, the high rate of appeals by both claimants and mine operators and the high number of remands by OALJ and BRB all prolong the resolution of claims. Although the cause for these rates is not entirely clear, it is evident that the program's structure can create financial incentives for both miners and mine operators to continue to file or extend appeals. Without ways to streamline or speed the appeals process, expedite hearings for remote areas, and avoid remands, many claims will likely continue to go unresolved for years. Yet, because DOL does not track all claims from initial application through appeals, the agency cannot begin to accurately assess the scope of this problem or develop strategies to improve it.

In recent years, few claimants have been able to meet all of the program's evidentiary requirements, and the current state of black lung science makes it difficult for claimants to meet certain requirements. Without a thorough examination of the ability of claimants to meet evidentiary standards or exploring alternatives to resolving claims, such as settlement, claimants with meritorious claims may not receive benefits.

Moreover, many claimants are not equipped with the medical and legal resources they need to develop evidence that will meet the program's requirements. While miners must be able to develop sound evidentiary support for their black lung cases, the medical evidence prepared by DOL-approved doctors does not consistently provide this support, and blood gas testing practices may contribute to inaccurate disability test readings. In the absence of complete and reliable medical evidence for miners, there is a greater chance that the judges who review the cases will be presented with medical evidence that is insufficient. Similarly, without better options for legal representation, significant numbers of claimants proceed with their claims through a complex and potentially long administrative process without the resources DOL officials and black lung experts note are important to developing evidence and supporting their claims. Yet, DOL does not collect data that would offer a complete assessment of the scope of this problem. Absent efforts to re-examine these structural issues and remedy administrative problems, claimants with meritorious claims will go without benefits, and delays in the resolution of claims will continue.

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**Recommendations for Executive Action**

To improve the effectiveness of the Black Lung Benefits Program, we recommend that the Secretary of Labor undertake the following seven actions:

1. Take steps to reduce the number of black lung cases remanded from BRB to OALJ by convening a group to determine the causes of these remands and develop solutions for reducing their incidence.
2. Obtain summary information on how long it takes to resolve claims using its current automated system to routinely track cases through the entire adjudication process and develop associated performance measures.
3. Consider shortening the time required to schedule hearings for black lung cases by examining the feasibility of using video teleconferencing technology to streamline the scheduling of hearings in remote areas.
4. Based on feedback from relevant black lung medical stakeholders, including approved diagnostic providers and Black Lung Clinics, develop options for improving how doctors' opinions are documented on DOL's medical evaluation form.
5. Evaluate and report on claimant access to legal and lay representation by implementing changes to the data management systems of OWCP, OALJ, and BRB that will permit accurate data about claimant representation throughout the claims and appeals process.
6. Evaluate and address blood gas testing practices that may contribute to inaccurate disability test readings by implementing a feedback mechanism to record and track complaints from federal black lung claims stakeholders about testing practices.
7. Examine the following issues and evaluate the potential for proposing structural changes to the program to Congress:
  - options for enhancing incentives for attorneys and lay representatives to take claimants' cases; areas that could be explored include alternate pay structures for attorneys and an examination of federal support for lay representation;
  - the costs and benefits of allowing compensation for partial disability and settlement of claims;

- the clinical limitations in documenting evidence to prove pneumoconiosis and total disability; and
- new and previous proposals to reduce the amount of time it takes to resolve claims and appeals, including requiring complete evidentiary development at the primary claims processing phase and limiting the need for appeals.

### Agency Comments and Our Evaluation

We provided a draft of this report to DOL for review and comment. The department provided written comments with OWCP, OALI, and BRB responding to our report in three separate letters. These letters are reproduced in appendix II. In its comments, DOL generally agreed with six of our recommendations, and disagreed with one recommendation. DOL agreed to take steps to reduce the number of black lung cases remanded from BRB to OALI by convening a group to determine the causes of these remands and develop solutions for reducing their incidence, though BRB expressed concern that the creation of an "independent panel" would be inappropriate. In order to respond to BRB's concern, we modified the language from "independent panel" to "group." We recognize BRB's judicial independence and authority and the need for the department to determine the reasons for remands in order to develop solutions to reduce them. The intent of our recommendation was not to assess or evaluate BRB's performance.

The department generally disagreed with our recommendation to obtain information on how long it takes to resolve claims by developing a mechanism to track cases through the entire adjudication process and develop associated performance measures. OALI and OWCP indicated in their individual responses that the current system does track the status of each claim and that the system is currently capable of tracking black lung claims throughout the appeals process. However, DOL does not currently track how long a claim remains in the adjudications process as one indicator of performance. We believe that DOL should leverage the capability of its current automated systems for routinely tracking such information and develop associated performance measures. Accordingly, we modified the wording of our recommendation to clarify this point.

In its response, OWCP provided its own analysis of the time it takes to resolve black lung claims. However, we were unable to verify the accuracy of OWCP's analysis because DOL did not provide us with the data or the calculations used to derive this figure. Moreover, when we carried out our analysis of time to resolve claims, OWCP stressed the difficulty of conducting such an analysis and provided us with data, some of which we found unreliable. It was because of this difficulty and the lack of reliable

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data that we focused our analysis on the only subset of data for which we could reliably determine claim resolution times—those cases that were ultimately awarded benefits. It also made sense to examine these cases because: (1) they were the most likely to be litigated, (2) were, in our opinion, the best available proxy for how long a litigated claim could remain in the system and (3) because other types of claims, such as Trust Fund claims, are unlikely to be appealed. OWCP said it provided its analysis because ours used data that represented approximately 2 percent of black lung claims that were filed between 2001 and 2008, according to its data. OWCP did not provide us with information about how it derived the 2 percent figure, so we could not verify its accuracy. However, given that few miners who bring a claim prevail, and we examined those where a miner was awarded benefits, we recognize that the cases we examined represent a small part of all claims. In the report, we made clear that these cases were only a small subset of all cases and that processing times for these cases could not be generalized. Moreover, even though the claims we examined represent a minority of claims filed, they are part of the constituency that the Act sought to ensure would have recourse through the system. OWCP officials told us that they did not believe that a global measure of timeliness would improve its ability to measure performance or provide any other benefit. We disagree and believe that such a measure would add transparency that might ultimately improve DOL's processes.

The department concurred with our recommendation to consider shortening the time required to schedule OALJ hearings. The OALJ supported the idea that video teleconferencing hearing technology could assist in expediting hearings in remote locations and used their comments to begin considering issues related to acquiring such technology.

DOL also agreed with our recommendation to develop options for improving how doctors' opinions are documented. Though OWCP agreed with our recommendation, in their comments agency officials emphasized that any revisions to the form should include a "well-reasoned narrative" and allow less room for legal challenge from parties, not more. However, we believe that it is essential for DOL to collect and consider feedback from stakeholders in their revisions to the form.

In response to our recommendation to collect more specific data for evaluating claimant access to legal and lay representation, DOL agreed to enhance their existing systems to begin to track when in the process a claimant is represented and whether the claimant is represented by an attorney or lay representative. OALJ, in its individual comments, disagreed with us on the extent to which claimant representation data is currently being captured by OALJ. However, we still maintain that the data provided

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by OALJ was not sufficiently reliable and that system enhancements—including the type of representation a claimant secured and at what point a claimant received that representation (e.g., 1 month, 4 months, or 1 year after an appeal)—are required for DOL to develop a more accurate assessment of the level of claimant access to representation.

DOL also stated that it would expand its existing medical provider database to include records of complaints in response to our recommendation to implement a feedback mechanism to record and track complaints from black lung program stakeholders about testing practices. Though they generally agreed with our recommendation, OWCP expressed concern that an increase in complaints could discourage even good doctors from remaining on DOL's list of approved medical providers. However, the purpose of our recommendation is not to penalize good doctors, but for DOL to begin to track complaints so that the agency can begin to understand the extent to which disability testing errors occur with DOL-approved doctors as well as mine company-hired doctors.

DOL also agreed with our recommendation to evaluate the potential for proposing structural changes to the program to Congress. In response to our recommendation, both OWCP and OALJ used their comments to begin an examination of potential options for consideration for legislative changes. DOL also submitted technical changes to a draft of the report, which we incorporated into the report as appropriate.

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We are sending copies of this report to the Secretary of Labor, relevant congressional committees, and other interested parties. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

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If you or your staff have any questions about this report, please contact me at (202) 512-7215 or [sherrilla@gao.gov](mailto:sherrilla@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on last page of this report. GAO staff who made key contributions to this report are listed in appendix III.

Sincerely yours,

*Andrew Sherrill*

Andrew Sherrill  
Director, Education, Workforce,  
and Income Security Issues

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## Appendix I: Objectives, Scope, and Methodology

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To gain insight in to the administration of the Black Lung Benefits Program, we examined (1) how long it takes to process and resolve black lung benefits claims; (2) at what rate and for what reasons black lung claims and appeals are denied by the Department of Labor (DOL); and (3) what barriers, if any, confront miners or their survivors in pursuing their claims.

To determine how long it takes to process black lung benefits claims, we collected data from the Office of Workers' Compensation Programs (OWCP) Automated Support Package claims tracking system, Office of Administrative Law Judges (OALJ) Case Tracking System, and the Benefits Review Board (BRB) Prime Appeals Tracking System. We assessed the reliability of OWCP, OALJ, and BRB data by (1) performing electronic testing of required data elements; (2) reviewing existing information about the data and the system that produced them; and (3) interviewing agency officials knowledgeable about the data. We also obtained processing data from performance reports from each of the three agencies. We determined that the data were sufficiently reliable for the purposes of this report. To establish criteria, the team compared current black lung claims and appeals processing times to the program's past performance and to agency and Office of Management and Budget performance goals. In addition to conducting data analysis, the team conducted interviews with officials from OWCP, OALJ, and BRB.

To determine how long claims remain in the claims and appeals process, we collected data from the OWCP Automated Support Package claims tracking system. However, DOL does not track how long all claims remain in the claims and appeals process. DOL officials cited three primary reasons for not doing so: each body of the program maintains independence and does not share similar administrative processes or computer systems; OWCP's claimant tracking system was designed, in part, to ensure that claimants are paid, not to determine how long claims remain in the process; and determining how long claims remain in the claims and appeals process can be challenging because it is difficult to determine what constitutes a claims resolution. For these reasons, we were only able to determine how long claims persisted in the claims and appeals process for one subset of claimants: miners for whom a

responsible mine operator (RO) ultimately paid benefits.<sup>1</sup> Although DOL provided data on other claimants, such as miners' widows who were awarded benefits, the data were not sufficiently reliable to determine the time to resolve these claims. We attempted to determine if newer claims were resolved at different rates than older claims and how two major regulatory changes to the program instituted in 1981 and 2001 affected claim resolution times.<sup>2</sup> However, our report focused on claims filed between January 19, 2001, and December 31, 2008, because DOL officials said that these claims more accurately reflected how long claims persist in the current claims and appeals process. We determined the time that claims persisted in the process by measuring the date of the initial claim application to the date when a RO agreed to pay benefits.<sup>3</sup> Our examination assessed two cohorts: 3,073 claims filed between January 2, 1982, and January 19, 2001, and 763 claims filed between January 20, 2001, and December 31, 2008. However, many claims filed between 2001 and 2008 are still in the claims and appeals process and hence could not be measured. Therefore, the time calculated to resolve these newer claims may not be fully representative of the time necessary to resolve the claims and appeals process.

To determine the rates at which black lung claims and appeals are denied by DOL, we collected case tracking data from OWCP, OALJ, and BRB. OWCP was able to provide us with data tracking the number of denials, and we used these data to determine the OWCP denial rate. OALJ and BRB do not keep such data. To determine the OALJ and BRB denial rates, we reviewed all fiscal year 2008 OALJ and BRB case documents from a list generated from the agencies' respective case tracking systems. We calculated the number of denials and the total number of cases and then

<sup>1</sup>Given the challenges noted above, we did not attempt to determine how long claims that were denied remained in the process, even though they may represent a significant proportion of claims. We also did not focus on claims where a miner was awarded benefits from the Black Lung Disability Trust Fund because, according to officials, many of these claims are awarded at OWCP, and it is unlikely that these awards would be appealed.

<sup>2</sup>45 *Fed. Reg.* 13678 (Feb. 29, 1980) and 65 *Fed. Reg.* 79920 (Dec. 20, 2000), respectively.

<sup>3</sup>Claims resolved in 1 year or less included 138 claims that recorded "zero" as the number of days in which a RO agreed to pay benefits. DOL officials said that this is an artifact of their claims process. Specifically, in some cases, a mine company agrees to pay shortly before or after OWCP's initial decision, and for administrative reasons, a zero is recorded. However, for 24 of these claims, the number of days in which a RO agreed to pay benefits appeared unreliable (e.g., when an agreement to pay was dated several years prior to the claim application date). These claims were not omitted from our analysis.

computed a denial rate. To determine the reasons that black lung claims were denied, we collected data from OWCP's case tracking system that captures the reasons for denials. Neither OALJ nor BRB track the reasons why appeals are denied; therefore, to establish the reasons why black lung appeals were denied, we selected random probability samples of all black lung OALJ and BRB appeals cases decided and denied in fiscal year 2008, recorded the results of this analysis into a data collection instrument, and projected the results onto the population. We sampled 85 cases for OALJ and 76 cases for BRB. All percentage estimates in this report from these samples have a margin of error of plus or minus 10 percentage points or less at the 95 percent confidence level, unless otherwise noted. In addition to our data analysis, the team also conducted interviews with officials from OWCP, OALJ, BRB, and the National Institute for Occupational Safety and Health (NIOSH).

To understand the barriers that claimants face in pursuing federal black lung benefits, we conducted interviews with key officials and experts at DOL and other relevant federal agencies, representatives with national, regional, and local organizations that focus on issues or provide support services related to black lung disease and associated disability, as well as local stakeholders who are involved in federal black lung claims on behalf of miner-claimants. At DOL, we interviewed officials with OWCP, OALJ, and BRB and officials and experts with NIOSH, the Centers for Disease Control and Prevention, and the Health Resources and Services Administration. We interviewed representatives from national organizations, including the National Mining Association, the United Mine Workers of America, and the National Coalition of Black Lung and Respiratory Disease Clinics. At the regional and local levels, we interviewed representatives of federal grant-supported Black Lung Clinics, Washington and Lee University's black lung legal clinic, as well as miner-claimants and a range of local black lung stakeholders, including doctors, outreach workers, lawyers, and lay representatives.

In our interviews, we collected information about factors that facilitate and hinder miners' pursuit of federal black lung benefits, including the availability and adequacy of relevant medical and legal services to miners. Our interviews with DOL officials specifically focused on the department's policies, procedures, and guidance for providing or assisting claimants with identifying such services, as well as their views on the effectiveness of such services in assisting claimants to develop sound evidence for their cases. Our interviews with miner-claimants and local black lung stakeholders, including Black Lung Clinic personnel, were organized as site visits to southern West Virginia and eastern Kentucky. These states

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**Appendix I: Objectives, Scope, and Methodology**

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and regions were selected because they have (1) high levels of miner death related to black lung disease,<sup>4</sup> (2) a large volume of federal black lung claims,<sup>5</sup> and (3) estimates of black lung-related resources and services.<sup>6</sup> The site visits provided valuable information about the challenges miners face in pursuing federal black lung benefits from the perspective of claimants, as well as local black lung stakeholders who have worked closely with claimants. In addition, we reviewed relevant federal statutes, regulations, administrative cases, and court cases.

We conducted this performance audit from October 2008 to October 2009 in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

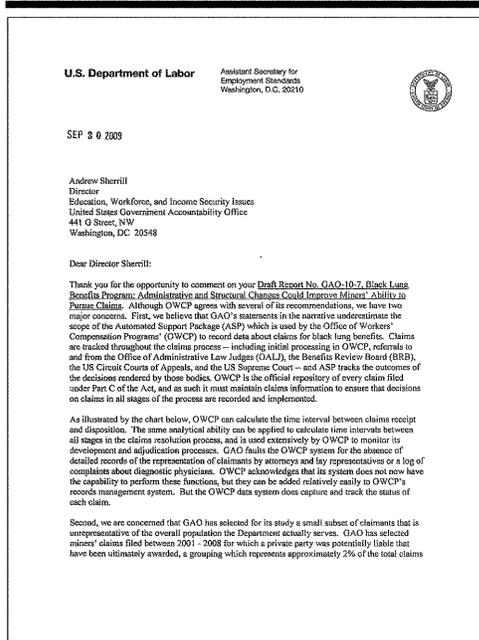
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<sup>4</sup>Based on 2009 data derived from NIOSH's National Occupational Respiratory Mortality System.

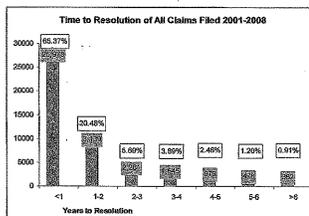
<sup>5</sup>Based on 2009 data derived from OWCP.

<sup>6</sup>Based on the opinions of national experts and federal agency officials.

## Appendix II: Comments from the Department of Labor



filed during that period. The report states that this cohort of claims was selected because it represents the cases most likely to be litigated; because of that tendency, a significant portion of these claims took several years to reach an award. However, an analysis of all claims decided during that period shows that only 0.91% took over 6 years to be resolved. GAO's sample consisted of 763 claims out of 32,626 (not including the automatic continuation of benefits to dependent survivors of miners whose awarded claims were filed before January 1, 1982). A more representative graph, showing all claims filed in that period, is attached below:



Further, certain clarifications are in order. On the first page, GAO states that the Black Lung Program provides \$250 million in benefits to 40,000 beneficiaries. In fact, OWCP also administers Part B of the program, which distributed an additional \$202 million in black lung benefits to over 33,000 disabled miners and their survivors in FY 2008. Those benefits are funded from the general revenues rather than the Trust Fund. On page 10, the phrase "claims can be appealed and modified up to a year after a decision" should read "modification may be requested up to one year after a decision denying benefits and may also be requested by any party up until one year after the last payment of benefits." The statement in the notes to Figure 2 that modification can be requested "10 or up to a year after initial payment" is also inaccurate and should be replaced. Footnote 2 fails to mention that Federal black lung benefits are only offset by state workers compensation or other disability benefits which are awarded for the same disease. Footnote 46 on page 19 reads "By regulation, there is an irrebuttable presumption of pneumoconiosis..." This should read "By statute, there is an irrebuttable presumption of total disability due to pneumoconiosis if X-rays of the miner's lungs show a spot or lesion that is greater than 1 centimeter in diameter. 30 U.S.C. §921 (Sec. 411(e)(3))." The regulation cited by GAO merely parallels the statutory language. Similarly, in footnote 11, which addresses the irrebuttable presumption, the phrase "present with" should be replaced with "have x-ray

evidence of." On the opening "Highlights" page, GAO states that the "regulations require that claimants prove that their condition is primarily caused by coal dust." In truth, a claimant need only establish that his lung disease is "significantly related to or substantially aggravated by" coal dust, a less stringent standard (20 CFR § 718.201(b)). Footnote 3 appears to limit black lung to only two diseases, clinical pneumoconiosis and chronic obstructive pulmonary disease. The Act and regulations expansively define coal workers' pneumoconiosis as any chronic lung disease arising out of coal mine employment and its sequelae (20 U.S.C. §900(b); 20 C.F.R. § 718.201(a)). Finally, footnote 10 incorrectly implies that if a miner has 10 years of coal mine employment any lung disease he has will be presumed to be due to that employment. This presumption applies only to miners suffering from clinical pneumoconiosis.

Finally, we would like to address the Recommendations for Executive Action that specifically concern OWCP.

Regarding recommendation 2), OWCP already tracks the times required to perform each of the stages of its claims development and adjudication processes, has established timeliness goals for them and continues to make significant progress in reducing the times required for their completion. The OALJ and BRB also have established goals for the performance of their roles in the hearings and appeals process. While we are able to track all portions, we do not believe that development of an overall global measure from receipt of claim to disposition would contribute more to the goal of timely disposition of claims than is currently being achieved through the efforts to complete each stage in the adjudication process in a more timely manner.

Regarding 4), GAO believes that OWCP should "develop options for improving how doctor's opinions are documented...." OWCP agrees, and believes that GAO's recommendation for obtaining feedback from stakeholders has great merit. OWCP shares GAO's concern about how its diagnostic physicians document their diagnoses and opinions, and has made a strenuous effort to educate doctors on the need to ensure their findings are supported by test results. OWCP district office and national office staff have worked closely with physicians when questions have been raised about the adequacy of their reports. The difficult question of how much explanation the physician should supply has been addressed in the recent Court of Appeals decision in *Stonew v. King Janes Coal Mining, Inc.*, 575 F.3d 628 (6<sup>th</sup> Cir. July 30, 2009), which found that a doctor's opinion that addresses all the elements necessary for entitlement is sufficient even if it is not persuasive. Because the regulations provide that totally disabling "legal pneumoconiosis" is compensable just as is "clinical pneumoconiosis," OWCP is apprehensive about not requiring the physician to write a well-reasoned narrative that includes a determination of the miner's disability due to a chronic dust disease of the lungs that may not evince the classic radiological findings of pulmonary fibrosis. OWCP wants to ensure that any reporting form that evolves from such feedback allows for challenge, not stave.

Regarding recommendation 3), OWCP recognizes the need for more specific data concerning representation of claimants and is initiating enhancements to its case management system to capture additional information about representation, including a delineation of lay or attorney and beginning and ending dates of representation.

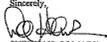
Regarding recommendation 4), analysis of an ABO test requires sophisticated technical knowledge and equipment, and it is not reasonable to expect a claimant (or any patient) to be able to determine if the test was administered in compliance with the regulations (20 C.F.R. § 718.105.) OWCP is concerned that allegations against and investigations of DOL-authorized

## Appendix II: Comments from the Department of Labor

physicians, even if unfunded, may drive good doctors out of the program. Nevertheless, the National Office of OWCP/DCLMWC does have a database of medical providers and will expand it to include a record of complaints from claimants and other parties reported to District Offices and the actions taken to resolve them.

In recommendation 7), GAO suggests the consideration of several changes to the Act, and OWCP will review all the GAO recommendations for potential legislative reform. OWCP notes that several of these recommendations, including alternate pay structures for attorneys and requiring complete evidentiary development at the initial phase of claims processing, were proposed in earlier black lung rulemakings. The Department carefully explained its ultimate conclusions in the preamble to the Final Rule that became effective on January 20, 2001. Also, Congress considered settlements and compensation for partial disability at the time of the original legislation and rejected it because it recognized the unequal bargaining power of ill, elderly miners when confronted with the resources of major mining and insurance companies. The purpose of the Act is to provide a lifetime of income maintenance to disabled miners and their dependent survivors, and one of its unique features is the provision of interim benefits to eligible claimants during the pendency of prolonged challenges to their entitlement. Under state workers' compensation systems, lump-sum settlements and partial benefits are frequently exhausted within a short period (a typical example of a state award is compensation for 104 weeks), and may run out long before the miner's pneumoconiosis progresses to the point of total disability which would permit the lifetime award mandated by the Act. At the end of FY 2008 less than 1% of awarded miners had any offsetting state workers' compensation award for the same disease. Although state workers' compensation benefits for total disability due to black lung disease are more generous than the Federal benefits, the laws of all of the major coal producing states impose more stringent criteria for their receipt than does the Federal program.

Thank you again for the opportunity to respond to this report.

Sincerely,  
  
 SHELBY HALLMARK  
 Acting Assistant Secretary

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Appendix II: Comments from the Department  
of Labor

U.S. Department of Labor

Office of Administrative Law Judges  
401 N Street, NW, Suite 402-N  
Washington, DC 20001-8002  
(202) 401-5300  
(202) 695-7385 (FAX)



September 30, 2009

Andrew Sherrill  
Director  
Education, Workforce, and Income Security Issues  
United States Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Director Sherrill:

Thank you for the opportunity to comment on the Draft Report No. GAO-10-7, Black Lung Benefits Program: Administrative and Structural Changes Could Improve Ability to Pursue Claims. The efforts of you and your staff in preparing this important report are appreciated, and the Office of Administrative Law Judges (OALJ) welcomes an examination of the claims process under the Black Lung Benefits Act. OALJ is in general agreement with the report's conclusions and recommendations, and offers only a few clarifications and comments.

**Comments on Recommendations for Executive Action**

1. *Development of mechanism for tracking claims throughout the adjudication*

OALJ concurs with the Office of Workers' Compensation Programs (OWCP) comments on this recommendation. The existing computerized case tracking systems for OALJ, OWCP and the Benefits Review Board (BRB) are designed to meet unique needs of each of those agencies. OALJ recommends that any initiative for developing a method to track claims throughout each stage of the adjudication should focus on leveraging information from the existing systems, rather than creating a new system or consolidating the existing systems.

2. *Examination of feasibility of using video teleconferencing technology*

OALJ concurs that video-hearing technology could assist in expediting the scheduling of hearings on those occasions when the hearing location cannot be easily combined with other cases on an Administrative Law Judge's docket.

The Social Security Administration (SSA) has used video-hearing technology successfully in adjudications, and is presently expanding its use of that technology. OALJ has followed SSA's video-hearing program and those of other agencies and courts, examined video hearing technology at the College of William and Mary School of Law's Center for Legal and Court Technology, and conducted a few video hearings. Consequently, we recognize that video technology has the capacity under the proper circumstances for facilitating a timely and fair

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 Appendix II: Comments from the Department of Labor
 

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hearing, and would welcome the opportunity to do a more formal examination of whether video-hearings would assist the hearing process at the Department of Labor.

OALJ's experience with black lung adjudications, however, suggests that video technology may be of limited value in the Black Lung Benefits Program. Notably, a vast majority of black lung hearings are conducted in the coal mining regions of the United States and claims in these areas are scheduled regularly throughout the fiscal year. On the other hand, the number of cases delayed because the hearing location is remote is relatively low.

For hearings conducted in remote locations, OALJ is uncertain whether video conferencing technology will be available or easily accessible. Presently, less expensive alternatives have been employed by OALJ to adjudicate these claims. For example, Administrative Law Judges have conducted telephonic hearings on request of the parties. The transcripts from these hearings become part of the formal record. Also, on agreement of the parties, Administrative Law Judges have issued decisions "on the record." In such cases, the parties submit their medical evidence, affidavits, and arguments to the Administrative Law Judge who, in turn, issues a decision based on the documentation.

3. *Development of mechanism for evaluating claimants' access to legal and lay representation*

The report concludes that some adjudicatory delays related to claimants' difficulty in finding legal representation could be better evaluated by implementing changes to the data management systems of OWCP, OALJ and the BRB. The reason for this recommendation appears to be GAO's finding that the Department's systems could not produce data in the format GAO needed for its report. For example, OALJ's existing system could not identify when in the process a representative was obtained by the claimant, or whether the representative was an attorney or a lay representative.

Enhancements could be made to OALJ's case tracking system to record such information. We are not certain, however, how recording and reporting this information in a database would assist in remedying the problem of lack of representation.<sup>1</sup> Rather, we suggest that this is already a well understood problem, and that the focus should be examining whether incentives for attracting more attorneys and lay representatives to represent claimants is warranted.

4. *Requiring complete evidentiary development at the primary processing phase*

The report recommends evaluation of "[a]ny and previous proposals . . . requiring complete evidentiary development at the primary claims processing phase and limiting the need

<sup>1</sup> According to OALJ's Case Tracking System, approximately 90 percent of claimants are represented at the OALJ level. As noted in the report, Administrative Law Judges actively encourage claimants to obtain representation. Although Administrative Law Judges are prohibited by regulation from appointing counsel or referring a claimant to an attorney, OALJ's public website contains a list of black lung clinics, OWCP offices, and a law school clinic program that claimants may contact for assistance.

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 Appendix II: Comments from the Department of Labor
 

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for appeals." By law, black lung hearings must be conducted in accordance with the Administrative Procedure Act, which ensures full and fair adjudications of claims.

Black lung hearings are adversarial. Employers and carriers, with rare exception, are represented by counsel and have resources to develop evidence. Consequently, closing the record at the OWCP level may have the unintended effect of lowering a claimant's opportunity to successfully prosecute his or her claim. Allowing evidentiary development by the parties at the OALJ level, and confining to allow access to a formal hearing before an Administrative Law Judge, is essential to a fair hearing process.

Further, as the system is presently constituted, it is unnecessary for employers or carriers to expend resources at the OWCP level if the Department-sponsored examination under 20 C.F.R. § 725-406 is unfavorable to the miner. Indeed, as noted in the report, "about 80 percent of all claims decided by OWCP annually have no requests for further action."<sup>3</sup> This high rate of resolutions at the informal OWCP level militates against the necessity of forcing parties to develop all medical evidence at that level.

**General Comments**

*1. Weighing the medical opinions in a claim*

The draft report states that Administrative Law Judges rely on "non-clinical" evidence such as physician credentials, length of depositions or reports, and level of sophistication of the medical reports in determining entitlement.

To be clear, the "clinical" evidence in a claim, which includes chest x-rays, autopsies or biopsies, CT-scans, and expert medical opinions based on a records review or examination of the miner dictate the outcome of a claim. In each and every decision issued by an Administrative Law Judge on the merits of a claim (as opposed to withdrawals, dismissals, or the like), the Administrative Law Judge specifically addresses each piece of "clinical" evidence submitted by all parties in compliance with the evidentiary limitations at 20 C.F.R. § 725.414.

As in other workers' compensation programs, claims taking in this program often involve a "battle of the experts." Therefore, Administrative Law Judges are required by law to consider a physician's credentials as well as how well-reasoned and well-documented a physician's opinion is compared to the credentials and opinions of other experts in the claim. This has nothing to do with the length of a report or deposition; rather, it has to do with whether the physician's rationale and conclusions are supported by testing, symptoms, work and smoking histories, and examination results. Opinions that are better supported and better reasoned by credentialed physicians will be accorded greater weight by the Administrative Law Judge.

<sup>3</sup> See Draft Report at p. 12.

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 Appendix II: Comments from the Department of Labor
 

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 2. *Delay tactics*

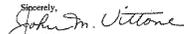
The report states that some claimants and employers may have incentives to prolong the claims adjudication process. Parties should well note, however, that Administrative Law Judges have little tolerance for delay tactics that may be utilized by either party and they will deny requests for continuances that do not have a reasonable basis, or that have become excessive in number.

Claimants who fail to cooperate during discovery in violation of an Administrative Law Judge's order, or who fail to attend their scheduled hearing, risk having their claims dismissed. Similarly, employers or carriers who violate an Administrative Law Judge's discovery orders, or fail to attend a scheduled hearing, risk having their evidence excluded and the claim decided on the basis of the Department-sponsored examination and evidence presented by the claimant.

The draft report states that some mine operators deliberately wait to submit their medical evidence until after the mine has submitted evidence and, often, such evidence is submitted just prior to the hearing. Certain safeguards are built into the regulations to protect claimants from consequences of this conduct. First, in every claim set for hearing, the Administrative Law Judge issues a "Notice of Hearing" that sets forth specific deadlines for submitting evidence. If any party fails to comply with these deadlines, then the Administrative Law Judge may exclude the late evidence. Moreover, pursuant to 20 C.F.R. § 725.456(p)(1), the parties are required to exchange medical evidence at least 20 days prior to the date of the hearing. Failure to comply with this requirement may lead the Administrative Law Judge to exclude the proffered evidence.

There are times, however, when scheduling a physical examination, or taking a physician's deposition is difficult due to time constraints on the parties and experts. By regulation, any party may depose its medical expert prior to the hearing, or have the expert testify at the hearing. At certain hearing locations, it is common for claimants to have physicians testify at the hearing in support of entitlement to benefits. In cases where evidence is submitted on the eve of the hearing or at the hearing, Administrative Law Judges may allow development of post-hearing evidence so that no party is disadvantaged, provided the Administrative Law Judge does not find improper motive in submission of the evidence.

Again, thank you for the opportunity to comment on the draft report. If you require any further information, please contact us at anytime.

Sincerely,  
  
 John M. Vitone  
 Chief Administrative Law Judge

- 4 -

U.S. Department of Labor

Benefits Review Board  
PO. Box 37601  
Washington, DC 20013-7001

September 21, 2009

Andrew Sherrill  
Director  
Education, Workforce, and Income Issues  
United States Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Director Sherrill:

Thank you for the opportunity to comment on the Draft Report No. GAO-10-7, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners Ability to Pursue Claims*. The effort of your staff, in addressing this important issue as well as the professional manner in which the information was acquired to review the complex statutory and regulatory claims process is appreciated. The Benefits Review Board (BRB) is in general agreement with the report's conclusion and recommendations and offers only a few comments for clarification purposes.

**Comments on BRB's Role in Adjudication of Miner's Claims:**

The report provides analysis that is incomplete with respect to the BRB's statutorily-created standard of review for final decisions on appeal from the Office of the Administrative Law Judges under the Longshore Act and the Black Lung Act.

Pursuant to Section 21(b)(3), 33 U.S.C. §921(b)(3) of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Black Lung Act by Section 422, 30 U.S.C. §932, the BRB is charged with reviewing the findings of fact and conclusions of law of administrative law judges (ALJs) in cases on appeal before it. If substantial evidence supports the findings of fact, and those findings of fact are consistent with the applicable law, the ALJ's decision is affirmed; if not, the case is remanded to the ALJ to correct the errors.

The GAO report finds that approximately one-third (33%) of the BRB's decisions are remands and that the Board affirms denials in 46% of the cases it considers. It follows that in approximately 20% of cases, the BRB affirms the ALJ's award of benefits. In addition, the Board reverses the ALJ's Decision and Order as a matter of law in approximately 1% of the cases it considers. In cases of affirmance, the BRB is affirming the findings of the ALJ, whether an award or denial. To suggest that

the Board remands cases for procedural matters is simply not true. Historic consistent appeal rates from the BRB to the U.S. Court of Appeals (10%) and affirmance of BRB decisions by the U.S. Court of Appeals (85-90%) confirm this. The BRB reviews ALJ findings of fact for substantial evidence, and affirms them if they are rational and consistent with applicable law, in accordance with the Administrative Procedure Act. The BRB is a creature of statute with limited authority, as set forth above.

**Comments on Recommendation for Executive Action:**

Recommendation 1: BRB believes "creation of an independent panel" is inappropriate. The BRB is a statutorily created independent quasi-judicial body with responsibility to review the cases appealed to it, pursuant to a statutorily created standard of review.

However, if the purpose of the recommendation is to analyze the reasons for the remand of cases, GAO is advised that the Board maintains a complete library of its issued decisions, both on the web and in hard copy. A study of the reasons for remand is possible by reviewing those decisions and cataloging the rationale provided in each case in support of remand.

**GENERAL COMMENTS:**

*Page 7 – Figure 2.*

the second block down, under "BRB Benefits Review Board in Figure 2," "In the Overview of the Black Lung Claims Adjudication Process," The Board's actions also include "Remanding."

*Page 10 - Issues of Appeal / Modification.*

The report suggests that the time for filing both an appeal and a request for modification is one year. The time for filing an appeal and time for filing a request for modification are 30 or 40 days, and one year, respectively. An appeal and a modification request are two separate legal actions with respect to a case. The statutory authority to seek modification within one year of any action on a claim extends the timeline for resolution of a claim.

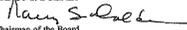
*Page 14 - Remand*

For the record, the Board notes its disagreement with comments attributable to "some ALJ's" regarding the purpose of BRB remands.

*Page 21 - Legal Representation*

The report correctly expresses concern over the lack of legal representation for claimants pursuing claims. However, the report does not reflect any of the discussions held with the audit team regarding BRB's standard of review in an appeal where a claimant does not have an attorney. When an appeal is filed by a claimant without an attorney (*a pro se* appeal) the Board provides a complete substantial evidence review on all issues of fact and law pertinent to the ALJ's decision. In many cases this results in an ALJ denial of benefits being remanded for reconsideration of whether claimant is entitled benefits.

Sincerely,

NANCY S. DOLDER  
  
Chairman of the Board  
and Chief Administrative Appeals Judge

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## Appendix III: GAO Contact and Staff Acknowledgments

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<b>GAO Contact</b>	Andrew Sherrill, (202) 512-7215 or sherrilla@gao.gov
<b>Acknowledgments</b>	Patrick Dibattista (Assistant Director) and Michelle Bracy (analyst-in-charge) managed all aspects of the assignment. Edward Bodine, Christopher Lyons, and Brenda Muñoz made significant contributions to this report, in all aspects of the work. In addition, James Ashley, Cynthia Grant, and Jean McSween provided technical support in design and methodology and statistical analysis; Doreen Feldman and Roger Thomas provided legal support; James Bennett and Susan Bernstein assisted in the message and report development; and Jeff Miller assisted with quality assurance.

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## **Attachment 15**



## WORKERS' RIGHTS

**Black lung surges back in coal country**

by **Chris Hamby**  
July 8, 2012



James Crisp/AP Images for The Center for Public Integrity

Reading Time: 18 minutes

**Key findings:**

- After decades of decline, black lung is back. Its resurgence is concentrated in central Appalachia. Younger miners are increasingly getting the most **severe, fastest-progressing** form of the disease.
- The system for monitoring miners' exposure to the dust that causes black lung allows companies to cheat or exploit loopholes. From 2000 to 2011, the federal Mine Safety and Health Administration, MSHA, received **more than 53,000 valid samples** showing an underground miner had been exposed to more dust than was allowed, yet the agency issued **just under 2,400 violations**. This may be attributable, in part, to rules that allow samples to be averaged, potentially masking some miners' high exposures.

Black lung surges back in coal country – Center for Public Integrity <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights...>

- Even when companies get caught, they have little to fear. They can take five of their own dust samples to prove compliance, and an MSHA citation goes away. The agency has routinely given companies extra time to fix cited dust problems, **granting extensions in 57 percent** of cases between 2000 and 2011.
- Miners have been exposed for years to excessive amounts of **toxic silica dust**, generated when powerful machines cut through rock. In each of the past 25 years, the average valid silica sample was above the allowed limit.

PRESTONSBURG, Ky. — Ray Marcum bears the marks of a bygone era of coal mining. At 83, his voice is raspy, his eastern Kentucky accent thick and his forearms leathery. A black pouch of Stoker's 24C chewing tobacco pokes out of the back pocket of his jeans. "I started chewing in the mines to keep the coal dust out of my mouth," he says.

Plenty of that dust still found its way to his lungs. For the past 30 years, he's gotten a monthly check to compensate him for the disease that steals his breath — the old bane of miners known as black lung.

In mid-century, when Marcum worked, dust filled the mines, largely uncontrolled. Almost half of miners who worked at least 25 years contracted the disease. Amid strikes throughout the West Virginia coalfields, Congress made a [promise](#) in 1969: Mining companies would have to keep dust levels down, and black lung would be virtually eradicated.

Marcum doesn't have to look far to see that hasn't happened. There's his middle son, Donald, who skipped his senior year of high school to enter the mines here near the West Virginia border. At 51, he's had eight pieces of his lungs removed, and he sometimes has trouble making it through a prayer when he's filling in as a preacher at Solid Rock Baptist Church.

There's James, the youngest, who passed on college to enter the mines. At 50, his ability to breathe is rapidly declining, and his doctor has already discussed hooking him up to an oxygen tank part-time.

Both began working in the late 1970s — years after dust rules took effect — and both began having symptoms in their 30s. Donald now has the most severe, fastest-progressing form of the disease, known as complicated coal workers' pneumoconiosis. James and the oldest Marcum son, Thomas, 59, have a simpler form, but James has reached the worst stage and is deteriorating.

Men with lungs like the Marcums' are not supposed to exist. In the hard-won 1969 law, Congress demanded that dust be controlled and new cases of disease be prevented. The idea was that, even if black lung didn't disappear, there would be a small number of mild cases and virtually no one like Donald and James Marcum, said Dr. Donald Rasmussen, a pioneer in recognizing and diagnosing black lung.

"In 1969, I publicly proclaimed that the disease would go away before we learned more about it," Rasmussen, now 84 and still diagnosing miners, said in a recent interview at his office in Beckley, W.Va. "I was dead wrong."

Throughout the coalfields of Appalachia, in small community clinics and in government labs, it has become clear: Black lung is back.

The disease's resurgence represents a failure to deliver on a 40-year-old pledge to miners in which few are blameless, an investigation by the Center for Public Integrity and NPR has found. The system for monitoring dust levels is tailor-made for cheating, and mining companies haven't been shy about doing so. Meanwhile, regulators often have neglected to enforce even these porous rules. Again and again, attempts at reform have failed.

A Center analysis of databases maintained by the federal Mine Safety and Health Administration found that miners have been breathing too much dust for years, but MSHA has issued relatively few violations and routinely allowed companies extra time to fix problems.

MSHA chief [Joe Main](#) issued a statement in response to the findings: "The current rules have been in effect for decades, do not adequately protect miners from disease and are in need of reform. That



James Crisp/AP Images for The Center for Public Integrity

Black lung surges back in coal country – Center for Public Integrity <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights...>

is why MSHA has proposed several changes to overhaul the current standards and reduce miners' exposure to unhealthy dust." Similar attempts at reform have died twice before.



From 1968 through 2007, black lung caused or contributed to roughly 75,000 deaths in the United States, according to government data. In the decades following passage of the 1969 law, rates of the disease dropped significantly. Then, in the late 1990s, this trend reversed.

Many of the newer cases have taken a particularly ugly form. While rates of black lung overall have increased, incidence of the most severe, fast-progressing type has jumped significantly. These cases, moreover, are occurring in younger and younger miners. Of particular concern are "hot spots" identified in central Appalachia by the National Institute for Occupational Safety and Health, [NIOSH](#), a government research agency. Though levels of disease are still below what they were before 1970, medical experts and miners' advocates are alarmed.

#### What is black lung?



Coal workers' pneumoconiosis, or black lung, is a disease caused by inhaling coal mine dust. The advanced form, referred to as complicated, is also known as progressive massive fibrosis. The accumulation of the dust particles in the lungs causes breathing complications. Those diagnosed with the simple form of the disease may not notice any symptoms, but as the disease progresses, a cough and shortness of breath develops, as well as moderate to severe airway obstruction, decreasing quality of life. The disease is diagnosed through chest X-rays and breathing tests.

Source: WebMD.com. Images: NIOSH

#### What is black lung?

"I think any reasonable epidemiologist would have to consider this an epidemic," said Scott Lancy, a NIOSH epidemiologist. "All cases of [black lung] are preventable in this day and age, but these cases of [the most severe form] are just astounding ... This is a rare disease that should not be occurring."

The [National Mining Association](#), the main trade group representing mining companies, disputes some of NIOSH's data but agrees that black lung's resurgence is a problem in need of attention. To the association, however, it is primarily a regional phenomenon of central Appalachia — one that doesn't justify new national rules. What's needed, the group says, is further study and better enforcement of [current standards](#).

Researchers are struggling to explain what, after years of progress, has caused the backsliding and why black lung, traditionally viewed as an old man's disease, is striking younger and younger miners and robbing them of their breath faster and faster. They are trying to figure out why men like the Marcums are the new face of black lung.

#### 'A diabolical torture'

"They call me Lucky," retired miner James Foster says as he takes off his shirt and presses his chest against an X-ray machine in the back of an RV in Wharton, W. Va. "Worked 37 years in all kinds of mines. Been covered up twice. Been electrocuted."

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His brushes with death aside, he's here because he fears there may be one hazard he can't dodge. "I come in here to file for my black lung," he says. During a recent heart surgery, he says, doctors said they saw what appeared to be signs of the disease.

He's one of a handful of miners on an April afternoon to move through the RV parked at the fire department in Wharton, in the heart of coal country. Inside, a team of NIOSH workers shepherds them from station to station: medical history, questionnaire, breathing test, chest X-ray. Foster hopes the tests will provide evidence he can use to submit a claim for benefits. Other miners are still working and want to make sure their lungs are clear.

It is from this rolling medical unit, in part, that NIOSH has documented the return of black lung. For decades, miners have been entitled to free X-rays every five years, and this has helped track the drop in the disease's prevalence. After the data started showing a reversal, NIOSH [sent its RV](#) out to gather more data in 2005.

What these researchers [found](#), combined with data from routine medical monitoring, was worrisome: From the 1970s through the 1990s, the proportion of miners with signs of black lung among those who submitted X-rays dropped from 6.5 percent to 2.1 percent. During the most recent decade, however, it jumped to 3.2 percent.

Even more disturbing: Prevalence of the most severe form of the disease tripled between the 1980s and the 2000s and has almost reached the levels of the 1970s.

In a triangle of Appalachia — southern West Virginia, eastern Kentucky and western Virginia — the numbers were even higher. The rolling unit found a disease prevalence of 9 percent in Kentucky from 2005 to 2009, for example.

A wake-up call for some came after the Upper Big Branch explosion in southern West Virginia in April 2010, which killed 29 miners. Of the 24 who had enough lung tissue for an autopsy, 17 [had signs](#) of black lung. Some had fewer than 10 years of experience in mines; they ranged in age from 25 to 61.

The disease leaves miners' lungs scarred, shriveled and black. They struggle to do routine tasks and are eventually forced to choose between eating and breathing.

"No human being should have to go through the misery that dying of [black lung] entails," said Dr. Edward Petsonk, who treats patients with black lung and works with NIOSH. "It is like a screw being slowly tightened across your throat. Day and night towards the end, the miner struggles to get enough oxygen. It is really almost a diabolical torture."

**Underpinnings of an epidemic**

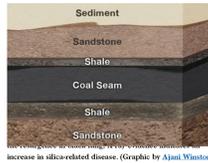
There are theories about why the disease has returned, but no definitive answers. One likely explanation: Miners are breathing a more potent mix of dust. Coal seams are surrounded by rock, much of which contains the mineral silica. When ground up, silica is more toxic to the lungs than coal dust and can cause faster-progressing disease.

With larger coal seams becoming mined out, companies are turning to thinner seams surrounded by more rock. At the same time, because of the price of coal and advances in mining equipment, it now makes more sense economically for companies to cut through large amounts of rock to get at the coal. Companies haul it all out and then separate the rock from the coal at processing plants.

"In central Appalachia, you look at what's coming out of the mines, and it's probably 60 percent rock on a good day," said [Rick Honaker](#), a University of Kentucky professor who consults for mining companies and has seen their data.

NIOSH [research](#) suggests this may be having an effect. A particular marker on a chest X-ray is often indicative of silica-related disease. Comparing miners' X-rays taken from 2000 to 2008 with those taken during the 1980s, researchers found that the proportion bearing these markers had nearly quadrupled and, in central Appalachia, had increased almost eight times over.

[Rules](#) are supposed to limit the amount of silica in the air in mines, but a Center analysis of MSHA's dust sampling database, obtained under the Freedom of Information Act, shows that the agency has long failed to control silica dust.



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In each of the past 25 years, the average of all silica samples — taking into account only those deemed valid by MSHA — has been higher than the allowed limit. Last year, for example, roughly 40 percent of the valid samples were above this limit. What's more, the limit MSHA enforces is already twice the level NIOSH [determined](#) to be safe in 1974.



The National Mining Association contends that what appears to be a nationwide increase in black lung is actually a spike in silica-related disease in Appalachia. "The problem here is, look, these people were overexposed to horrendous levels of silica, for God's sake," said Bob Glenn, an expert hired by the association. "Why hasn't something been done?"

To the association, this means there is no need for a new rule on coal dust, just better enforcement of the silica standard.

Another possible explanation for the uptick in disease: The number of hours worked by miners has steadily increased over the past three decades, MSHA data show. Ten- and 12-hour shifts and six- or seven-day workweeks are now common.

"I have stayed [in a mine] sometimes two days and never come out," said Donald Marcum. Sometimes, he said, "you'd just lay down beside the power box, sleep an hour or two and stay right there."

Longer hours mean more exposure to dust and less recovery time. The lungs can clear some dust by themselves if given the chance, and many miners said in interviews that they often spit up a mixture of mucus and dust.

At the same time, production has increased, thanks in part to powerful new equipment. A longwall shearer, for example, can carve out huge swaths of coal in little time.

Mark McCowan ran one of these behemoths for the final years of his career. "By the time I was 40 years old, I had mined more coal than most miners mine in a lifetime," he recalled, sitting in his living room in Pounding Mill, Va. "You would get in some areas of the coal face where, when you mine, you can't see the hand in front of your face. ... I would eat so much dust I would throw up."

McCowan was diagnosed with black lung at age 40. His disease has progressed to the most severe form; now 47, he finds it harder and harder to breathe. He pointed to a photo of a beaming, blond-haired 2-year-old on his wall — his grandson, Haiden. McCowan sees him two or three times a week and plays with him for as long as his lungs can take. "My biggest fear," he said, "is I won't live long enough for him to remember me."

#### Decades of cheating

Donald Marcum knew he was at least a passive participant in something that was against the rules, maybe even criminal. Every couple of months, his bosses had to send MSHA five samples showing they were keeping dust levels under control. The man with the greatest potential exposure — often Donald because he was running a continuous mining machine, which chews through coal and rock and generates clouds of dust — was supposed to wear a pump to collect dust for eight hours.

That almost never happened. Most of the time, he said, the mine foreman or someone else would take the pump and hang it in the cleaner air near the mine's entrance.

When MSHA inspectors showed up to take their own samples, it wasn't so easy to cheat. Donald would actually wear the pump, but he and his co-workers would mine only about half as much coal as they normally did, generating far less dust.

"We just done what we was told because we needed to feed our families and really didn't look at what it might be doing to our health," he said.

Donald's experience echoed what Center and NPR reporters heard from retired miners throughout West Virginia, Kentucky and Virginia who had worked underground as recently as 2008. Dust pumps ended up in lunchboxes or mine offices. Mine officials stalled regulators who had shown up for a surprise inspection and radioed to the men underground, who fixed the ventilation and cleaned up the work site.

It's difficult to tell how widespread such practices are, but many former miners described some variation of cheating occurring regularly at almost every mine where they had worked — and a culture of fear fostered by the companies. "We always set and thought, you know, maybe if we didn't do it this way, that

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they'd come in and shut the mines down. Then we'd be out of work," said David Neil, a 52-year-old West Virginia miner with black lung who now drives a coal-hauling truck.

**Tim Bailey**, a lawyer in Charleston, W.Va., zeroes in on this type of cheating when he sues a coal company on behalf of a miner with black lung. In general, the only option for miners who get the disease is to file a claim with the state or the U.S. Department of Labor to try to get **benefits**. But Bailey takes a different tack, drawing on a state law that allows workers to sue their employer in cases of knowing exposure to dangerous conditions.

This often amounts to proving that the company manipulated its dust samples. In depositions, miners have described hanging dust pumps in cleaner air or getting advance warnings of inspections. Over the past eight years, he's handled about 40 such cases. In each case, he said, the coal company eventually settled.

"These are criminal acts," Bailey said. "What's different about these black lung cases is that the cheating is such a part of everyday practices."

Then there are the numbers themselves. For decades, the average sample submitted by a coal company has been far below the limit. NIOSH researchers used a formula to estimate the prevalence of black lung that would be expected based on the dust samples and compared this with the disease rates actually occurring.

What the researchers **found** was surprising: The two didn't match up at all. In some areas of the country, there was actually less black lung than they'd predicted. But in central Appalachia, the disease rates were much higher — more than three times the predicted levels in eastern Kentucky, for example.

It was possible, researchers concluded, that the nature of the dust had become more potent. Another possibility: The dust samples reflected the results of rampant cheating.

Many of the games described by miners today remain unchanged from those outlined by miners who testified at a 1978 MSHA hearing. The early 1990s saw the "abnormal white center" scandal, in which MSHA figured out that many coal company officials had blown dust off the sampling filters, leaving a white center, before submitting them. A spate of criminal convictions of companies and some employees and contractors followed. This time period accounted for the bulk of the 185 guilty pleas or convictions for dust sampling fraud between 1980 and 2002, according to data provided by MSHA to the Center and NPR.

The agency said it had no records of criminal convictions or guilty pleas since 2002 and wouldn't say whether any criminal cases had been pursued. MSHA did provide data indicating that it had decertified 14 mine officials since 2009, pulling their authority to conduct dust samples.



A 1980 MSHA video about black lung disease

"I don't know if any [cheating] is going on today," said Bruce Watzman, the National Mining Association's senior vice president for regulatory affairs. "I hope not. We encourage our members to fulfill their obligations under the law."

Cheating aside, the system for monitoring dust levels is almost designed not to detect problems. Nor has MSHA always been swift to act when violations do surface.

From 2000 to 2011, MSHA received more than 53,000 valid samples — both from companies and its own inspectors — that showed an underground miner had been exposed to more dust than was allowed, yet the agency issued just under 2,400 violations, a Center analysis of MSHA data showed.

This may be attributable, in part, to the way the rules are written. When companies submit five samples to MSHA, some are allowed to be above the limit. Only the average of these five has to be low enough, allowing companies to negate high samples taken from miners enshrouded in dust. What's more, the pump runs for only eight hours, even if the miner works 10 or 12.

While an inspector is sampling, a company is allowed to mine as little as half the amount of coal it normally does. Companies that typically cared little about hanging curtains to keep air flowing through the mine or making sure water sprays used to suppress dust were working suddenly did when it came time to sample, several miners said.

Even when a company gets caught with samples that are too high, all it has to do to make the citation go away is take five of its own samples that indicate compliance. "The analogy I use is, if I pull you over for speeding, going 80 in a 50," Bailey said, "and I tell you ... here's a journal, and I want you to record

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your speed on this same piece of road for the next five days. And, if at the end of those five days, your speed is below the speed limit, then I am going to tear your ticket up.”

Sometimes MSHA has allowed dust citations to go uncorrected for weeks or even months, potentially leaving miners overexposed, a Center analysis of agency data shows. MSHA sets a date by which a violation must be fixed, but, from 2000 to 2011, the agency granted extensions for 57 percent of the violations.

Long extensions have been particularly common in southern West Virginia, one of the key “hot spots” of disease resurgence identified by NIOSH. In this area, which accounted for about 30 percent of the nation’s dust sampling violations, MSHA gave companies an extension about two-thirds of the time and allowed, on average, about 58 extra days to prove compliance.

Asked about these numbers, the agency said in a statement, “The majority of these extensions ... are for good reasons such as getting approved dust controls implemented or allowing the operator time to collect additional samples to submit to MSHA.”

#### A roadmap for reform

Even before the reappearance of black lung, the need for change was apparent. A proposed MSHA rule led to hearings in 1978, during which miners testified to widespread manipulation of dust samples. That proposal stalled and was withdrawn by the Reagan administration.

In 1995, NIOSH [reviewed](#) the scientific evidence and concluded that the limits for both coal dust and silica should be cut in half and periodic medical exams for miners should be subsided. The same year, the secretary of labor appointed a committee to determine how to eliminate black lung.

The committee’s [report](#) offered a roadmap for reform. It recommended that MSHA consider lowering the coal mine dust standard. It suggested the agency reduce miners’ silica exposure and establish a separate limit for this more potent type of dust. Samples should be taken while the mine was producing at least 90 percent of what it normally did, the panel said, and samples should be adjusted to reflect longer work shifts.

Perhaps its strongest recommendation: “The committee believes that the credibility of the current system of mine operator sampling to monitor compliance with exposure limits has been severely compromised. ... One of MSHA’s highest priorities should be to take full responsibility for all compliance sampling.”

In July 2000, MSHA proposed a rule that would have adopted some of these recommendations. Before the rule became final, though, George W. Bush took office, and the rule died.

“It’s really fairly remarkable that we came up with these recommendations back in 1996 during a Democratic administration, and nothing has happened,” said [David Weseman](#), who was chairman of the committee and is now an emeritus professor at the University of Massachusetts Lowell’s School of Health and Environment.

History may be repeating itself: MSHA proposed a [rule](#) in 2010 that would cut the overall limit for dust in half and require companies to use [continuous personal dust monitors](#), which would provide real-time measurements. The current pumps have to be sent to a lab, where analysis can take weeks.

Under the rule, the samples would be weighted to account for shifts longer than eight hours, and companies could be cited for a single sample over the limit — rather than an average of five — or a weekly accumulation of exposure above a certain limit. The rule would also expand the free X-ray monitoring program to include lung function tests and medical assessments.

Still, the rule leaves much of the sampling in the hands of the coal companies themselves. Asked why, Main said, “It’s an enormous task for the government to take on.”

Even industry favors MSHA’s taking over all compliance sampling. “We need to get to a point where we remove this cloud of controversy and instill in the minds of everyone that the samples are accurate,” the National Mining Association’s Watzman said.

There isn’t much in the rule that the association supports, however. The real-time dust monitors — a centerpiece of the proposal — are still not accurate enough to be the basis of citations, Watzman argued. Dennis O’Neil, safety director for the United Mine Workers of America, said the few problems with the monitors are “little things that can be tweaked.” The union favors the proposed rule, though it would like to see portions of it changed.

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All of this may be moot. A presidential election is approaching, and many fear a change in administrations could mean what it meant in the early 1980s and the early 2000s: the death of reform.

#### 'I never said nothing'

In coal country, weakness is a sin. Mining is just about the only career choice, and one generation often follows another underground.

Convincing a miner to go to a clinic, get an X-ray or file a claim for benefits can be a challenge. "They're not going to come and complain about how they feel, just because that's part of our culture," said Debbie Willis, sitting in the clinic in tiny Cedar Grove, W.Va., where she helps miners get evaluated and file for black lung benefits.

At the same time, fear is almost as deeply rooted. Many miners don't want their employers to know they have signs of black lung — or even that they've been X-rayed. Anita Wellek, who runs NIOSH's surveillance program and is often out with the RV that screens miners, said she has seen men approaching on foot from miles away because they didn't want anyone to see their cars parked nearby.

Thanks to a [rule](#) MSHA issued in 1980, a miner whose X-ray shows signs of black lung receives a letter that requires his employer to transfer him to a less dusty job and pay him the same as before. The miner alone sees the letter, and he can use it whenever he wants.

Only about 30 percent of the nearly 3,000 letters issued to miners since 1980 have been used, according to MSHA data provided to the Center and NPR.

Sometimes miners avoid screening because they just don't want to know. A diagnosis of black lung would likely mean having to leave the mines — the best-paying job around and the only way they know to provide for their families. "It's very known throughout the coal community there's no cure for this," Willis said. "They want to pretend like everything's OK until they just can't do it anymore."

All of this has led NIOSH to believe that the resurgence of black lung may actually be worse than its numbers reveal. "We know that there is disease out there that we are not identifying because miners are avoiding participation based upon disease status," NIOSH epidemiologist Laney said.

Take James Marcum: He spent his last semester of high school taking a class at the University of Kentucky because he already had enough credits to graduate. His father, having filed for black lung benefits a few years earlier, encouraged him to go to school and stay out of the mines.

Nonetheless, James took a summer job at a mine to earn money for college. "I started earning them \$800-a-week pay-days and said, 'Why would I want to go to college when I'm earning this kind of money?'" he recalled, standing in the shadow of Dewey Dam at the family's annual picnic at Jenny Wiley State Park in Prestonsburg, Ky.

He spent about 90 percent of his 20-year mining career, he estimated, operating a continuous miner. In 1991, the motor of the machine he was running caught fire, and smoke overcame him.

When doctors examined him and took X-rays, they found what appeared to be black lung. James kept the news to himself and didn't file for benefits, afraid he'd lose his job if he did. "It was good money," he said. "I had my kids to raise, and I just had to work. ... I never said nothing. I just went on and done my job."

About six years later, James found himself back in the hospital. He'd been caught between two pieces of the continuous miner and injured his back. Alone in that section of the mine when the accident happened, he finished his shift and went to the hospital the next morning.

Doctors again took X-rays, and, this time, his lungs were so bad he had to see a specialist. A biopsy confirmed that he had black lung.

Since then, breathing has become more and more difficult for him, especially during the past year. "I miss hunting bad," he said. "I used to take my boys hunting. But I just ain't able no more. ... I ain't got the air to do it."

The youngest of the three Marcum brothers, he has shown the worst decline in lung function. At the family's picnic, while Donald socialized and Thomas talked to their father, Ray, over plates of fried chicken, coleslaw and potato salad, James sat quietly.

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He glanced at his oldest son, 26, who now works in a mine. Without realizing it, James paraphrased his father: "I tried to get him out. He won't come out. He loves the job."

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**BREATHLESS AND BURDENED**

**Johns Hopkins medical unit rarely finds black lung, helping coal industry defeat miners' claims**

by [Chris Hamby](#), [Brian Ross](#) and [Matthew Meak](#)  
October 30, 2013



Retired mine Steve Day, 67, needed supplemental oxygen 24 hours a day to breathe. He died July 2014 at age 67, still awaiting a decision in his case for federal black lung benefits. © Brian Ferguson/Center for Public Integrity

Reading Time: 26 minutes

More from "Breathless and Burdened"

Part One: [The Law Firm](#)

- The Center for Public Integrity reports how a prominent law firm has withheld evidence of black lung in cases over the years, helping to defeat the benefits

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claims of sick miners.

**Part Two: [The Doctors](#)**

- The Center, in partnership with ABC News, reports on the crucial role played by doctors — including a unit at the nation's top-ranked hospital — in helping to beat back miners' benefits claims. Reports will appear on [publicintegrity.org](https://publicintegrity.org) and [abcnews.go.com](https://abcnews.go.com), and televised segments will air on *World News* and *Nightline*.

**Part Three: [The Next Battleground](#)**

- The Center reports on the newest battle in the long-running war between coal companies and miners, revealing the latest industry effort to defuse emerging scientific evidence and contain its liabilities.

GLEN FORK, W. Va. — Across Laurel Creek and down a dirt road in this sleepy valley town is the modest white house where Steve Day grew up. For more than 33 years, it was where he recuperated between shifts underground, mining the rich seams of the central Appalachian coalfields and doing his part to help make Peabody Energy Corp. the nation's most productive coal company. Now, it's where he spends most days and nights in a recliner, inhaling oxygen from a tank, slowly suffocating to death.

More than a half-dozen doctors who have seen the X-ray and CT images of his chest agree he has the most severe form of black lung disease. Yet his claim for benefits was denied in 2011, leaving him and his family to survive on Social Security and a union pension; they sometimes turn to neighbors or relatives for loans to make it through the month.

The medical opinions primarily responsible for sinking his claim didn't come from consultants-for-hire at a private firm or rogue doctors at a fringe organization.

They came from a respected household name: the [Johns Hopkins Medical Institutions](#).

The Johns Hopkins University often receives attention for its medical discoveries and well-regarded school of public health, and its hospital recently was ranked the nation's best by *U.S. News and World Report*.

What has remained in the shadows is the work of a small unit of radiologists who are professors at the medical school and physicians at the hospital. For 40 years, these doctors have been perhaps the most sought-after and prolific readers of chest films on behalf of coal companies seeking to defeat miners' claims. Their fees flow directly to the university, which supports their work, an investigation by the Center for Public Integrity and ABC News has found. According to the university, none of the money goes directly to the doctors.

Their reports — seemingly ubiquitous and almost unwaveringly negative for black lung — have appeared in the cases of thousands of miners, and the doctors' credentials, combined with the prestigious Johns Hopkins imprimatur, carry great weight. Their opinions often negate or outweigh whatever positive interpretations a miner can produce.

For the credibility that comes with these readings, which the doctors perform as part of their official duties at Johns Hopkins, coal companies are willing to pay a premium. For an X-ray reading, the university charges up to 10 times the rate miners typically pay their physicians.



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Dr. Paul Wheeler, the longtime leader of a unit at Johns Hopkins that for decades has read X-rays and CT scans for coal companies defending black lung benefits claims (ABC News)

Doctors have come and gone from the unit over the years, but the leader and most productive reader for decades has been [Dr. Paul Wheeler](#), 78, a slight man with a full head of gray hair and strong opinions.

In the federal black lung system, cases often boil down to dueling medical experts, and judges rely heavily on doctors' credentials to resolve disputes.

When it comes to interpreting the chest films that are vital in most cases, Wheeler is the coal companies' trump card. He has undergraduate and medical degrees from Harvard University, a long history of leadership at Johns Hopkins and an array of presentations and publications to his credit. In many cases, judges have noted Johns Hopkins' prestige and described Wheeler's qualifications as "most impressive," "outstanding" and "superior." Time and again, judges have deemed him the "best qualified radiologist," and they have reached conclusions such as, "I defer to Dr. Wheeler's interpretation because of his superior credentials."

Yet there is strong evidence that this deference has contributed to unjust denials of miners' claims, the Center found as part of a yearlong investigation, "[Breathless and Battered](#)." The Center created a database of doctors' opinions — none previously existed — scouring thousands of judicial opinions kept by the Labor Department dating to 2000 and logging every available X-ray reading by Wheeler. The Center recorded key information about these cases, analyzed Wheeler's reports and testimony, consulted medical literature and interviewed leading doctors. The findings are stark:

- In the more than 1,500 cases decided since 2000 in which Wheeler read at least one X-ray, he never once found the severe form of the disease, complicated coal workers' pneumoconiosis. Other doctors looking at the same X-rays found this advanced stage of the disease in 390 of these cases.
- Since 2000, miners have lost more than 800 cases after doctors saw black lung on an X-ray but Wheeler read the film as negative. This includes 160 cases in which doctors found the complicated form of the disease. When Wheeler weighed in, miners lost nearly 70 percent of the time before administrative law judges. The Labor Department does not have statistics on miners' win percentage in all cases at this stage for comparison purposes.
- Where other doctors saw black lung, Wheeler often saw evidence of another disease, most commonly tuberculosis or histoplasmosis — an illness caused by a fungus in bird and bat droppings. This was particularly true in cases involving the most serious form of the disease. In two-thirds of cases in which other doctors found complicated black lung, Wheeler attributed the masses in miners' lungs to TB, the fungal infection or a similar disease.
- The criteria Wheeler applies when reading X-rays are at odds with positions taken by government research agencies, textbooks, peer-reviewed scientific literature and the opinions of many doctors who specialize in detecting the disease, including the chair of the American College of Radiology's task force on black lung.
- Biopsies or autopsies repeatedly have proven Wheeler wrong. Though Wheeler suggests miners undergo biopsies — surgical procedures to remove a piece of the lung for examination — to prove their cases, such evidence is not required by law, is not considered necessary in most cases and can be medically risky. Still, in more than 100 cases decided since 2000 in which Wheeler offered negative readings, biopsies or autopsies provided undisputed evidence of black lung.

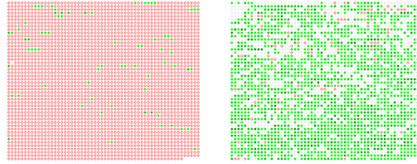
In an interview, Wheeler held strongly to his views. In his telling, he is more intellectually honest than other doctors because he recognizes the limitations of X-rays and provides potential alternative diagnoses, and he is adhering to a higher standard of medical care by demanding biopsies to ensure patients get proper treatment.

"I've always staked out the high ground," Wheeler said.

The university defended Wheeler, saying in a statement he "is an established radiologist in good standing in his field."



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*For decades, Dr. Paul Wheeler has led a unit of radiologists at Johns Hopkins who often are called by the coal industry to read X-rays in black lung benefits cases. The Center for Public Integrity identified more than 2,500 cases decided since 2009 in which Wheeler was involved, reading a total of more than 3,400 X-rays. In these cases, he never found a case of complicated black lung, and he read an X-ray as positive for the earlier stages of the disease in less than 4 percent of cases. Subtracting from these the cases in which he ultimately concluded another disease was more likely, this number drops to about 2 percent.*

University officials questioned the findings by the Center and ABC, requesting extensive documentation, which the news agencies provided. After initially responsive responses, officials at Johns Hopkins did not answer most questions but instead provided a general written statement.

"To our knowledge, no medical or regulatory authority has ever challenged or called into question any of our diagnoses, conclusions or reports resulting from the ... program," the statement said.

After the Center and ABC again posed questions about documents showing that judges and government officials had challenged the opinions of Wheeler and his colleagues on numerous occasions, university officials sent the same statement again.

That statement also said, "In the more than 40 years since this program's inception, [Johns Hopkins radiologists] have confirmed thousands of cases to be compatible with [black lung]."

In some cases reviewed by the Center and ABC, Wheeler opined that an X-ray could be compatible with black lung but that another disease was more likely, ultimately grading the film as negative.

The news organizations asked the university how many times he had provided a truly positive reading. Johns Hopkins officials would not answer or clarify what they meant by "compatible."

Judges at varying times have called Wheeler's opinions "disingenuous," "erroneous," "troubling" and "antithetical to ... regulatory policy," court records show.

One judge dedicated an entire section of his [ruling](#) to the Johns Hopkins specialists. Wheeler and two colleagues "so consistently failed to appreciate the presence of [black lung] on so many occasions that the credibility of their opinions is adversely affected," Administrative Law Judge Stuart A. Levin wrote in 2009.

"Highly qualified experts can misread x-rays on occasion," he wrote, "but this record belies the notion that the errors by Drs. Wheeler [and two colleagues] were mere oversight."

But, to discredit his readings and award benefits to a miner, as Levin did, judges must identify a logical flaw or some other reason not to give his opinion greater weight than those of other doctors. Former judges said they knew certain doctors almost never found black lung, but said they were barred from taking these experiences in other cases into consideration. In four cases reviewed by the Center, judges who have questioned Wheeler have seen their decisions vacated by an appeals board.

Retired judge Edward Terhune Miller, who often saw Wheeler's opinions in cases before him, said he sometimes was compelled to deny claims even when he had serious doubts about the opinions of coal-company experts from Hopkins and elsewhere. Miners often were unable to provide enough evidence to

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overcome these opinions, and he wasn't allowed to take his personal knowledge of doctors' tendencies into account. "That's one of the frustrations in the process," said the former judge. "There's no doubt about it."

Wheeler said he is sure miners who don't have black lung are being wrongfully compensated. "They're getting payment for a disease that they're claiming that is some other disease," the doctor said.

He takes issue with a law passed by Congress in 1969 that was crafted to lessen the burden of sick miners while limiting coal companies' liabilities. Benefit payments for a miner start at just over \$600 a month and max out at about \$1,250 monthly for a miner with three or more dependents. Because these caps are low and miners are presumed to be at a particular risk for the disease, the system does not require they prove their cases beyond all doubt. Still, miners must show that they have black lung and that, because of it, they are totally disabled. About 85 percent of claims are denied at the initial level.

"I think if they have [black lung], it should be up to them to prove it," Wheeler said. To him, this means undergoing a biopsy. If miners don't submit to the procedure, he said, it suggests they may be afraid the results will show they have something other than black lung.

“

***"I think if they have [black lung], it should be up to them to prove it."***

— DR. PAUL WHEELER, RADIOLOGIST FOR JOHNS HOPKINS

Biopsies are rarely necessary to diagnose the disease and can put the patient at risk, according to the American Lung Association, the National Institute for Occupational Safety and Health (NIOSH), the Labor Department, a paper published by the American Thoracic Society and prominent doctors interviewed by the Center.

Told his higher standard of proof, which he maintains is ordinary medical practice, is not required by law, Wheeler held firm.

"I don't care about the law," he said.



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Relieved miner Steve Day at his West Virginia home. F. Brian Ferguson/Center for Public Integrity

### 'Victimized twice'

To people in the southern West Virginia town of Glen Fork, he is "Steve" — longtime miner, father of three, Vietnam veteran. To Dr. Paul Wheeler, from his vantage 400 miles away, he was "Michael S. Day Sr.," 58, another referral from corporate defense firm Bowles Rice LLP.

Wheeler has never been in a coal mine or met Steve Day. His opinion, though, proved crucial in Day's case.

In 2004, after more than three decades in jobs that exposed him to high levels of dust, Day's breathing worsened to the point his doctor urged him to get out of mining. In January 2005, he filed a claim for federal black lung benefits.

The Labor Department pays for a medical examination by a doctor from an approved list. Day unwittingly chose a doctor who commonly testifies for coal companies, yet even this physician diagnosed the most advanced stage of complicated black lung.

Then the opinions from Johns Hopkins began arriving.



This image, taken from a 2012 CT scan of Steve Day, shows a large mass in each lung. Dr. John E. Parker, who used to run the government's X-ray surveillance program, says they represent a classic case of complicated black lung.

A CT scan interpretation by Dr. John Scatarige, who is no longer at the university: Large masses in the lungs, probably tuberculosis, or maybe a fungal disease, or cancer. Black lung unlikely.

Two X-ray readings by radiologist William Scott Jr., with the university since the early 1970s: Large masses in the lungs, probably tuberculosis. Black lung unlikely.

And, most vitally, three X-ray readings and a CT scan interpretation by Wheeler: Large masses in the lungs, probably tuberculosis, histoplasmosis or a similar disease. Black lung unlikely.

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Peabody subsidiary Eastern Associated Coal Corp.'s chosen pulmonologist to review the evidence, Dr. Robert Crisalli, originally found black lung but changed his opinion after seeing Wheeler's interpretations. He adopted most of Wheeler's views and testified, "The basis for the conclusions primarily centers around the imaging, including the CT scans."

Day lost.

A spokesman for Peabody spinoff Patriot Coal Corp., which now owns the subsidiary that employed Day, declined to comment, as did a spokesperson for Peabody.

Like many miners, Day relied primarily on the opinion of the doctor who examined him for the Labor Department and the records from his treatment over the years. He was at a distinct disadvantage, squared off against the radiologists at Johns Hopkins.

In determining Day didn't have black lung, the Johns Hopkins experts relied on the same criteria they have recited in countless cases reviewed by the Center. Put simply, the white spots that show up on film must have a particular shape, appear in a specific area of the lung and follow a specific pattern.

At the Center's request, a physician not involved in the case, Dr. John E. Parker, reviewed Day's X-rays and CT scans taken between 2003 and 2012. Parker worked at NIOSH for 15 years, much of the time as director of the X-ray surveillance program and the program to certify qualified readers. He is now chief of pulmonary and critical care medicine at the West Virginia University School of Medicine, and travels the world teaching doctors to read X-rays in seminars, many for NIOSH and the American College of Radiology.

Parker was told only Day's name, age, number of years mining and the fact that the interpretation of the films was disputed.

**His clear-cut conclusion:** Complicated black lung. "Based on my findings in reviewing this case, and the classic nature of the medical imaging and history, I am deeply saddened and concerned to hear that any serious dispute is occurring regarding the interpretation of his classically abnormal medical imaging," Parker wrote. "If other physicians are reaching different conclusions about this case ... it gives me serious pause and concern about bias and the lack of scientific independence or credibility of these observers."

Told later that Day had lost his case, Parker was taken aback.

"It breaks my heart," he said. "This man has been victimized twice — once by the conditions that allowed him to get this disease and again by a benefits system that failed him."

#### Johns Hopkins experts help defeat hundreds of claims

The Center's review of thousands of cases suggests there are many more men like Day. Since 2000, miners have lost more than 800 cases after at least one doctor found black lung on an X-ray but Wheeler read it as negative. This includes 160 cases in which other doctors saw the complicated form of the disease.

George Hager, for example, worked in the mines for 37 years, and three doctors saw complicated black lung on his X-rays and CT scan. Three Johns Hopkins radiologists, including Wheeler, saw something else — perhaps tuberculosis or histoplasmosis. The judge noted the affiliation of the Johns Hopkins doctors and their "superior qualifications." Hager lost.

Douglas Hall's 27 years underground came to an end at the advice of his doctor; he couldn't walk 100 feet without struggling for breath. Four doctors read his X-rays as complicated black lung, but, again, three Hopkins radiologists, Wheeler among them, graded them as negative, finding tuberculosis or histoplasmosis more likely. Though tests for both diseases came back negative, Hall lost.

Keith Darago initially won twice. Three doctors saw complicated black lung on his X-rays and CT scans, and Administrative Law Judge Linda Chapman rejected attempts by the three Johns Hopkins radiologists to attribute the masses on the films to tuberculosis or a similar disease, particularly given Darago's negative tuberculosis test and lack of history of any other disease.

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But the Benefits Review Board, the highest appeals court in the administrative system, vacated the award of benefits twice and, at the coal company's lawyers' request, referred the case to a different judge. This time, the judge found the evidence on film to be a wash. Darago lost.

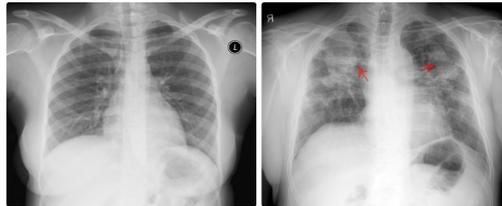
Some miners or their surviving family members continue to file claims, occasionally winning after their disease worsens or they die. Others simply give up, tired of fighting.

"I think it's a bad deal," said Rodney Gibson, another miner whose case followed a similar pattern. All the evidence of complicated black lung he presented wasn't enough. "They come out with a way of getting around it somehow," he said.

An X-ray of Steve Day's chest, taken in 2009, shows two large masses (indicated by arrows). On previous films, Dr. Paul Wheeler said the masses likely were caused by tuberculosis or a fungal infection from bird and bat droppings. A half-dozen doctors have interpreted the masses as complicated black lung. Dr. John E. Parker, who used to run the government's X-ray surveillance program, said this X-ray shows a classic case of the severe disease. Mouse over the X-rays to magnify the images. Images: [Yak Roman](#) (left), licensed [CC-BY-SA](#); courtesy of Steve Day family (right)

Normal X-ray

Steve Day's X-ray



**'Not using the system properly'**

Wheeler flips a switch, and a tall panel hums to life, emanating a white glow in the dark corridor where the Pneumoconiosis Section, as the group of Johns Hopkins radiologists is known, does its work. Papers bearing the letterhead of prominent corporate defense law firms sit at work stations, and stacks of folders in a storage closet have names of firms and coal companies written in Sharpie on their sides.

Wheeler places a series of chest X-rays against the panel and describes what he sees.

Small white spots obscure much of the lungs on one film, but they don't have the centralized "birdshot pattern" he's looking for. "I'd classify it as compatible with coal workers' pneumoconiosis," he says. "But I'd also say it certainly could be or more likely is histoplasmosis."



He moves to films showing large white masses. One doesn't have small spots surrounding it and is "pretty high [in the lung] — I would call it out of the strike zone," he says. He again suspects the fungal infection. "If you want to bet against histoplasmosis, you're going to lose an awful lot," he says.

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These X-rays, however, are not disputed films in a benefits case. They are the standard X-rays that the government says show pneumoconiosis — a family of disease that includes black lung and asbestosis, but not histoplasmosis, tuberculosis and similar illnesses. When reading for pneumoconiosis, government-certified readers are supposed to place the unknown X-ray next to these films; they are classic cases meant to be standards for comparison.

Wheeler questions this and says the classification system has “some quality issues.” He adds, “These are not proven.”

Experts like Wheeler must pass an exam every four years to retain their government certification. If a doctor were to classify these films as negative during that exam, the physician very likely would fail, said David Weissman, director of NIOSH’s Division of Respiratory Disease Studies, which sets the standards for how readings should be performed.

Wheeler, however, has continued to pass the exam for decades, most recently this April.

The form used in the U.S. and many other countries for interpreting X-rays contains boxes to grade what’s on the image and a comments field for further explanation. If spots appear on the X-ray, a reader is supposed to mark their size and shape, and then explain which diseases seem more or less likely.

When he reads X-rays for coal companies, however, Wheeler doesn’t do this. If he sees spots on the film but thinks another disease is more likely than black lung, he marks the film as negative. He typically describes the abnormalities in the comments section, explaining why they don’t meet his criteria for finding black lung. In case after case reviewed by the Center, his comments were almost identical.

Weissman said this approach is simply wrong.

“You’re supposed to grade what’s there,” Weissman said. “You’re not supposed to alter what the grade is based on what you think the underlying cause is. That’s not using the system properly.”

In a statement, university officials said the radiologists “adhere to the clinical standards of diagnosis noted in the guidelines” put forth by the International Labor Organization, upon which NIOSH relies.

Wheeler said he is being more responsible than other doctors by providing multiple possible diagnoses. He often grades the film as negative but says in the comments section that black lung is possible, but unlikely.

The practical effect of Wheeler’s readings: To rule out black lung. Judges may consider the comments he writes, but the key, in comparing Wheeler’s readings with others, is the negative numerical grade he assigns.

In depositions, he sometimes goes further to eliminate black lung as a cause of a miner’s failing health. “He doesn’t have [black lung],” he said in a 2004 case, for example. “[I]n no way is this [black lung],” he said in another.

Weissman said NIOSH often hears that some certified readers interpret X-rays the way Wheeler does and that others over-diagnose diseases. “It’s pretty frustrating sometimes when we hear of people that do well on the exam and then go out in the real world and do other things,” he said. “Absolutely that is a concern.”

The agency’s authority, he said, doesn’t go beyond education, training and administering the exam. People with complaints should contact the state medical board, he said.

#### No, by the numbers

There is an unmistakable pattern in Wheeler’s readings. The Center identified more than 1,500 cases decided since 2000 in which Wheeler read at least one X-ray; in all, he interpreted more than 3,400 films during this time.

The numbers show his opinions consistently have benefited coal companies.

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- Wheeler rated at least one X-ray as positive in less than 4 percent of cases. Subtracting the cases in which he ultimately concluded another disease was more likely, this number drops to about 2 percent.
- In 80 percent of the X-rays he read as positive, Wheeler saw only the earliest stage of the disease. He never once found advanced or complicated black lung. Other readers, looking at the same images, saw these severe forms of the disease on more than 750 films.
- Where other doctors saw black lung, Wheeler saw tuberculosis, histoplasmosis or a similar disease on about 34 percent of X-rays. This number shoots up in cases in which others saw complicated black lung, which is so severe it triggers automatic compensation. In such cases, Wheeler attributed the masses in miners' lungs to these other diseases on two-thirds of X-rays.

Asked if he stood by this record, Wheeler said, "Absolutely."

"I have a perfect right to my opinion," he added. "I found cases that have masses and nodules ... In my opinion, those masses and nodules were due to something more common."

When his views are questioned, Wheeler often shares anecdotes. He tells the story of performing an autopsy during his residency on a woman thought to have breast cancer; his examination revealed undetected tuberculosis. Other common stories include his father's severe illness from histoplasmosis and a colleague's bout with the infection after spending a rainy night in an abandoned chicken coop.

In a case decided in 2010, a doctor disputed Wheeler's narrow view of black lung, and the miner's lawyer asked Wheeler during a deposition whether he could cite medical literature to support his views.

"I don't think I need medical literature," Wheeler replied.

In a 2009 letter submitted in another case, Wheeler questioned two doctors who read X-rays as positive for black lung and wrote that he and a colleague who had provided opinions in the case "are clinical radiologists at one of the two or three best known hospitals in the world."

The judge was not impressed. "This self-serving, egotistical diatribe is unwarranted and very unprofessional," he wrote.

Wheeler took a similar approach in a recent interview, challenging the views of any doctor, judge or organization — including the Labor Department, NIOSH and the International Labor Organization — that contradicted his. He said he's never been told an interpretation of his was wrong and he'd admit a mistake only if a biopsy or autopsy showed black lung — and was performed by a pathologist with "proper credentials."

"I know my credentials," he said. "I'd like to make sure that the people proving me wrong ... have ... credentials as good as mine."

#### Proof in the tissue

In fact, tissue samples from miners' lungs have proven Wheeler wrong again and again.

The pathologists providing the interpretations were enlisted by the coal company in many cases, and they often came from well-regarded academic medical centers, such as Washington University in St. Louis and Case Western Reserve University, where Wheeler himself was a resident. Some helped write widely accepted standards for diagnosis of black lung with pathology and have been frequent experts for companies defending claims.

Wheeler's readings were negative even in some cases in which the company conceded the miner had black lung and chose to fight the claim on other grounds.

When clear pathology evidence did exist in cases reviewed by The Center, it tended overwhelmingly to show that the doctors who had found black lung — not Wheeler — were correct.

The American Lung Association, NIOSH, the Labor Department and a paper published by the American Thoracic Society say black lung usually can be diagnosed with an X-ray, knowledge of the miner's exposure to dust and studies of lung function. Biopsies, which Wheeler insists are "very safe," are invasive, risky and usually unnecessary, government officials and doctors said.

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Still, of the cases in which Wheeler submitted at least one negative reading, miners or their surviving family members submitted evidence from a biopsy or autopsy in more than 280 cases, a Center analysis found. Contrary to Wheeler's contentions, the pathology did not resolve most cases. In about half, the tissue evidence proved inconclusive or was disputed.

Of the remaining cases, 75 percent revealed undisputed evidence of black lung. In the other cases, the tissue did not show evidence of the disease, but, as the law states, this doesn't mean the miner didn't have black lung — only that it wasn't present on the piece of lung sampled.

In the cases in which pathology showed Wheeler was wrong, other X-ray readers saw black lung 80 percent of the time, and no interpretations outside of Johns Hopkins existed in another 12 percent.

Most times, then, only Wheeler and his Johns Hopkins colleagues failed to see black lung.

#### Diagnosis after death

Sometimes miners had to die to prove they had black lung.

George Keen worked 38 years in the mines and tried for 22 years to win benefits. At least two physicians interpreted his X-rays and CT scans as showing complicated black lung. Wheeler and his colleague Scott read them as negative — probably tuberculosis, they said. Keen lost.

Three years after the most recent X-rays and CT scans read by Wheeler were taken, Keen died. The company's chosen pathologist agreed the autopsy revealed complicated black lung.

John Banks, who started loading coal by hand at 17, had multiple claims denied. More than a half-dozen doctors saw black lung; Wheeler suspected cancer. When Banks died, pathologists looking at his lung tissue debated whether the disease had reached the complicated stage, but both sides agreed: He had black lung.

Emily Bolling suffered through much the same experience with her husband, Owen, who spent most of the last six years of his life on oxygen but wasn't able to win benefits.

"They would keep hiring more doctors and more doctors to read his X-rays, and we had just one," she said.

Wheeler read a 2002 X-ray as negative. Owen died in 2003, and two pathologists found that the autopsy showed black lung, allowing Emily to win her widow's claim. "It seems awful, but that's what it took," she said recently. "It's just wrong."

Ilene Barr is trying to win benefits following the 2011 death of her husband, Junior, who worked 33 years doing some of the dustiest jobs in the mines. In his final years, his health progressively worsened. "He loved to do things around the house," Ilene recalled. "He had a garden. But he became so short-winded he couldn't do any of that. He ended up basically just sitting on the deck."

He lost claims in 2008 and 2010 after Wheeler read X-rays as negative, saying histoplasmosis was much more likely.

"We just couldn't believe that it was happening," Ilene said.

Four months after Wheeler's most recent opinion that Junior likely was suffering from the bird-said-but-dropping disease, he died. Pathologists for both sides saw black lung on the autopsy. Ilene's benefits case is pending.

#### The Wheeler standard

Wheeler learned the strict criteria he applies from his mentor, Dr. Russell Morgan, a revered figure at Johns Hopkins. In the early 1970s, Morgan helped NIOSH develop the test to qualify as a "B reader" — a doctor certified to read X-rays for black lung and similar diseases. Wheeler served as one of his test subjects. The radiology department bears Morgan's name, and he went on to become dean of the medical school.

Morgan testified for companies defending a wave of lawsuits over asbestos-related disease. Wheeler testified before Congress in 1984, arguing that false

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asbestos claims were rampant and that plaintiffs should prove their cases by undergoing a biopsy. He asserted that similar problems existed in the black lung compensation system.

There is general acknowledgment now that X-ray evidence was misused in some asbestos claims. The black lung benefits system of today, however, is a different universe.

In some asbestos claims, plaintiffs won large verdicts or settlements, and lawyers got rich. For black lung, the payouts are comparatively meager — the maximum monthly payment, for miners with three or more dependents, is about \$1,250 — and few lawyers will take cases because the odds of winning and ultimate compensation are low. Settlements are not allowed, and miners have to prove total disability caused by black lung, not just show a minimally positive X-ray.

Wheeler continues to express concerns similar to those he voiced in 1984. "It comes down to ethics," Wheeler said. "If you think it's appropriate for somebody with sarcoid to be paid for [black lung] because he has masses and nodules — do you think that's appropriate? I don't think so."

After Morgan's death, Wheeler took over the "Pneumoconiosis Section." Asked if he viewed himself as the coal industry's go-to radiologist, Wheeler said: "Dr. Morgan was the go-to guy. ... I've replaced him ... in the pneumoconiosis section, yes. ... I can view myself as the doctor for a number of companies, not just coal companies."

In depositions and during the recent interview, Wheeler has insisted he is relying on the criteria Morgan taught, praising his predecessor as an innovator and genius. His criteria, however, do not comport with mainstream views on black lung.

"When you take this very strict view, where you put in all these rules, none of which are a hundred percent, what will happen is you'll wind up excluding people that have the disease," NIOSH's Weissman said.

According to medical literature and experts consulted by the Center, black lung does not always fit the narrow appearance Wheeler requires. Shown a text, for example, that says the disease may affect one lung more than the other, Wheeler said: "I don't know where they get this idea. ... It's not what Dr. Morgan taught me."

In fact, the statement comes from the standards established in 1979 by the College of American Pathologists. The report was compiled by a group of eminent doctors, including some who have testified regularly for coal companies.

Doctors interviewed by the Center said they had seen many cases of black lung that did not fit Wheeler's standards. "You'll see a variety of different presentations," said Dr. Daniel Henry, the chair of the American College of Radiology's task force on black lung and similar diseases. "The image can vary."

In one case decided in 2011, NIOSH got involved at the request of the doctor who examined the miner for the Labor Department. Multiple doctors had diagnosed complicated black lung, but Wheeler had read X-rays as negative. The spots on the X-rays didn't follow the pattern he wanted to see, he'd said, histoplasmosis was more likely.

Two NIOSH readers, however, saw complicated black lung on the film, and Weissman wrote a letter saying Wheeler's views "are not consistent with a considerable body of published scientific literature by NIOSH." The miner won his case.

#### Assumptions and 'bias'

A pair of assumptions shapes Wheeler's views in ways that some judges and government officials have found troubling.

Former miner Gary Stacy's struggle for benefits lays bare the effects of these beliefs.

When he filed for benefits in 2005, Stacy was only 39 years old, yet three doctors believed his X-rays and CT scans showed complicated black lung. He had worked for almost 20 years underground and had never smoked.

Wheeler, however, read two X-rays as negative. He wrote that Stacy was "quite young" to have complicated black lung, especially since the 1969 law required federal inspectors to police dust levels. (Histoplasmosis was much more likely, Wheeler thought.)

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A judge [denied](#) Stacy's claim in 2008, and it would take years of fighting and a rapid decline in his breathing before he won.

In reaching his conclusions about the cause of the large masses in Stacy's lungs, Wheeler drew upon beliefs that pervade his opinions: Improved conditions in mines should make complicated black lung rare, whereas, [histoplasmosis](#) is endemic in coal mining areas.

In case after case, Wheeler has said complicated black lung was found primarily in "drillers working unprotected during and prior to World War II."

Wheeler's contention contradicts a series of published studies by NIOSH researchers showing that the prevalence of black lung actually has increased since the late 1990s and that the complicated form increasingly is affecting younger miners. Wheeler contends these peer-reviewed studies aren't conclusive because they have not been confirmed by pathology.

Gary Stacy is the kind of miner NIOSH says it now sees more often. Just 47 today, he appears trim and healthy, but a few minutes of conversation reveal a different reality. His sentences are interrupted by hoarse gasps for breath.

Stacy now undergoes pulmonary rehabilitation to prepare for a lung transplant. As his illness worsened, the evidence became overwhelming, and his employer agreed to pay benefits.

The fact that nothing in Stacy's medical history indicated he'd suffered from histoplasmosis or tuberculosis didn't prevent Wheeler's readings from being credited in the 2008 denial. Someone could be exposed, show no symptoms and still develop masses that remain after the infection has fizzled out, Wheeler often has said.

This is theoretically possible, said doctors consulted by the Center, including an expert on histoplasmosis at the Centers for Disease Control and Prevention. But, doctors noted, in cases with masses as large as the ones Wheeler often sees on film, the patient likely would show symptoms and have some record of the disease in his medical history.

NIOSH's Weissman said the two diseases should rarely be confused on film. "The appearance of [black lung] is different from the typical appearance of ... histoplasmosis," he said. "That shouldn't be hard, in general, to make that differentiation."

Wheeler's main alternative suggestion once was tuberculosis, but he has switched to suggesting histoplasmosis more often. "Well, initially, I thought TB was ... causing these things," he said in an interview. "Yet many of those cases, he now believes, 'very likely were [histoplasmosis].'"

Could he be wrong again? "I could be," he said. "But I'd like to be proven wrong with biopsies."

In written opinions, judges have said Wheeler's assumptions seem to have "affected his objectivity" and "inappropriately colored his readings." Another wrote in 2011 that Wheeler had a "bias against a finding of complicated [black lung] in 'young' individuals."

In some cases, judges have questioned Wheeler's demands for biopsy proof and his speculative suggestions of other diseases. "The reasonable inference to be drawn from Dr. Wheeler's report and testimony is that he does not accept a diagnosis of [black lung] based on x-ray or CT scan alone," one judge wrote in 2010.

Another judge succinctly summarized Wheeler's opinion: "I don't know what this is, but I know it's not [black lung]."

#### Scraping to get by, struggling to breathe

Steve Day's wife, Nyoka, sleeps lightly. Most nights, they re-enact the same scene.

Steve sleeps upright in a recliner; if he lies flat, he starts to suffocate. Nyoka lies in bed in the next room over, listening to his breath and the hiss of the machine pumping oxygen through a tube in his nose. She waits for the sound — a faint gasp.

"I hurry in here, and I bend him over and say, 'Steve, cough,'" she said.



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"He'll try and get by without having to cough because it hurts. And I make him cough. I'll scream at him, 'Cough!'"

What



Retired miner Steve Day and his family outside their home in Glen Fork, WVa. (ABC News)



finally comes up is often black. They've made it through another night.

This is not the life they envisioned when Steve returned from Vietnam and they eloped. Both of their fathers had worked in the mines, and both had black lung. Before they got married, Steve made Nyoka a promise: He'd never go to work in the mines.

It wasn't long before he changed his mind, persuaded by his father: "He said that's the only way you can make good money," Steve recalled of the job that, in good years, earned him as much as \$55,000 or \$60,000. He worked just about every job underground. For much of his career, he ran a continuous mining machine, which rips through coal and creates clouds of dust.

"When he came out of the mines, all you could see was his lips, if he licked them," Nyoka recalled. "He was black except around his eyes."

After 33 years in the mines, he thought the cause of his breathing problems was obvious. So did his doctor, who is treating him for black lung.

The reports from Johns Hopkins floored Steve and Nyoka. There was nothing in his medical records to suggest he'd ever had tuberculosis or histoplasmosis, let alone a case so severe that it left behind multiple nodules and masses, including one occupying almost a third of one of his lungs.

Steve scowls at the mention of Wheeler's name. "The more I talk about him the madder I get," he said. "And the madder I get, my blood pressure shoots up."

Administrative Law Judge Richard Stansell-Gamm determined, based on the opinions of Wheeler and the pulmonologist who adopted most of Wheeler's findings, that Day had not proven he had black lung. The judge didn't come to any conclusions about what caused Day's severe illness.

He lost his case on May 31, 2011, and, three days later, the Labor Department sent Day a letter demanding \$46,433.50. The department had originally awarded Day's claim in 2005 and started paying benefits from a trust fund because the company's lawyers had appealed. Now that the initial award was overturned, the department wanted reimbursement for what it paid out during the six years it took for the case to reach a conclusion.

The department eventually waived the so-called "overpayment" after Day submitted documentation showing he had to support, to varying degrees, eight other people with only Social Security and a union pension.

"Each person of age tries to help but overall it isn't enough to survive on without borrowing," he wrote the department. "It has been very humiliating to have to do so, when everyone knows that I worked my life away from my children and my wife, in order to end up on full time oxygen for a company who isn't (decent) enough to acknowledge the damage 'their' job done to my body, my life, and my family."

Day has not given up hope of winning benefits, but, if he files again, he could find himself again having to overcome the opinions of Wheeler and his colleague at Johns Hopkins.

As he almost always does, Wheeler testified in Day's case that he should undergo a biopsy. Parker, the former NIOSH official who examined Day's X-rays

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and CT scans, said he'd advise against a biopsy because the risk of complications for someone with Day's level of disease is too great.

That leaves just one way, in Wheeler's opinion, to disprove him. Steve and Nyoka have already discussed it. "I done told her, 'If something happens to me, have an autopsy done on my lungs,'" Steve said.

Since he lost his case, Day's breathing has declined. He began full-time oxygen a year ago, but decided against a lung transplant. At 67, with his health problems, he likely would not be a good candidate.

Miners have developed a crude measure for how damaged their lungs are based on how upright they need to be to sleep.

"You start out with one pillow," Nyoka said. "Then you go to two pillows. Then three pillows, and that's supposed to be your top. Well, he went through that, and he got to where he couldn't breathe. So he got in the recliner, and he's just lived in that recliner for ..."

"Years," Steve interjected, staring out the window toward the tree-lined hillside.

"And now the recliner," Nyoka said. "It's not enough."

*Editor's note: Brian Ross and Matthew Mosk work for ABC News. Retired judge Edward Miller's daughter is employed by the network. The Center contacted him before ABC News joined the reporting for this story.*

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**BREATHLESS AND BURDENED**

**Johns Hopkins medical unit rarely finds black lung, helping coal industry defeat miners' claims**

by [Chris Hamby](#), [Brian Ross](#) and [Matthew Mosk](#)  
October 30, 2013



Retired mine Steve Day, 67, needed supplemental oxygen 24 hours a day to breathe. He died July 2014 at age 67, still awaiting a decision in his case for federal black lung benefits. © Brian Ferguson/Center for Public Integrity

Reading Time: 26 minutes

More from "Breathless and Burdened"

Part One: [The Law Firm](#)

- The Center for Public Integrity reports how a prominent law firm has withheld evidence of black lung in cases over the years, helping to defeat the benefits

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claims of sick miners.

**Part Two: [The Doctors](#)**

- The Center, in partnership with ABC News, reports on the crucial role played by doctors — including a unit at the nation's top-ranked hospital — in helping to beat back miners' benefits claims. Reports will appear on [publicintegrity.org](https://publicintegrity.org) and [abcnews.go.com](https://abcnews.go.com), and televised segments will air on *World News* and *Nightline*.

**Part Three: [The Next Battleground](#)**

- The Center reports on the newest battle in the long-running war between coal companies and miners, revealing the latest industry effort to defuse emerging scientific evidence and contain its liabilities.

GLEN FORK, W. Va. — Across Laurel Creek and down a dirt road in this sleepy valley town is the modest white house where Steve Day grew up. For more than 33 years, it was where he recuperated between shifts underground, mining the rich seams of the central Appalachian coalfields and doing his part to help make Peabody Energy Corp. the nation's most productive coal company. Now, it's where he spends most days and nights in a recliner, inhaling oxygen from a tank, slowly suffocating to death.

More than a half-dozen doctors who have seen the X-ray and CT images of his chest agree he has the most severe form of black lung disease. Yet his claim for benefits was denied in 2011, leaving him and his family to survive on Social Security and a union pension; they sometimes turn to neighbors or relatives for loans to make it through the month.

The medical opinions primarily responsible for sinking his claim didn't come from consultants-for-hire at a private firm or rogue doctors at a fringe organization.

They came from a respected household name: the [Johns Hopkins Medical Institutions](#).

The Johns Hopkins University often receives attention for its medical discoveries and well-regarded school of public health, and its hospital recently was ranked the nation's best by *U.S. News and World Report*.

What has remained in the shadows is the work of a small unit of radiologists who are professors at the medical school and physicians at the hospital. For 40 years, these doctors have been perhaps the most sought-after and prolific readers of chest films on behalf of coal companies seeking to defeat miners' claims. Their fees flow directly to the university, which supports their work, an investigation by the Center for Public Integrity and ABC News has found. According to the university, none of the money goes directly to the doctors.

Their reports — seemingly ubiquitous and almost unwaveringly negative for black lung — have appeared in the cases of thousands of miners, and the doctors' credentials, combined with the prestigious Johns Hopkins imprimatur, carry great weight. Their opinions often negate or outweigh whatever positive interpretations a miner can produce.

For the credibility that comes with these readings, which the doctors perform as part of their official duties at Johns Hopkins, coal companies are willing to pay a premium. For an X-ray reading, the university charges up to 10 times the rate miners typically pay their physicians.



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Dr. Paul Wheeler, the longtime leader of a unit at Johns Hopkins that for decades has read X-rays and CT scans for coal companies defending black lung benefits claims (ABC News)

Doctors have come and gone from the unit over the years, but the leader and most productive reader for decades has been [Dr. Paul Wheeler](#), 78, a slight man with a full head of gray hair and strong opinions.

In the federal black lung system, cases often boil down to dueling medical experts, and judges rely heavily on doctors' credentials to resolve disputes.

When it comes to interpreting the chest films that are vital in most cases, Wheeler is the coal companies' trump card. He has undergraduate and medical degrees from Harvard University, a long history of leadership at Johns Hopkins and an array of presentations and publications to his credit. In many cases, judges have noted Johns Hopkins' prestige and described Wheeler's qualifications as "most impressive," "outstanding" and "superior." Time and again, judges have deemed him the "best qualified radiologist," and they have reached conclusions such as, "I defer to Dr. Wheeler's interpretation because of his superior credentials."

Yet there is strong evidence that this deference has contributed to unjust denials of miners' claims, the Center found as part of a yearlong investigation, "[Breathless and Battered](#)." The Center created a database of doctors' opinions — none previously existed — scouring thousands of judicial opinions kept by the Labor Department dating to 2000 and logging every available X-ray reading by Wheeler. The Center recorded key information about these cases, analyzed Wheeler's reports and testimony, consulted medical literature and interviewed leading doctors. The findings are stark:

- In the more than 1,500 cases decided since 2000 in which Wheeler read at least one X-ray, he never once found the severe form of the disease, complicated coal workers' pneumoconiosis. Other doctors looking at the same X-rays found this advanced stage of the disease in 390 of these cases.
- Since 2000, miners have lost more than 800 cases after doctors saw black lung on an X-ray but Wheeler read the film as negative. This includes 160 cases in which doctors found the complicated form of the disease. When Wheeler weighed in, miners lost nearly 70 percent of the time before administrative law judges. The Labor Department does not have statistics on miners' win percentage in all cases at this stage for comparison purposes.
- Where other doctors saw black lung, Wheeler often saw evidence of another disease, most commonly tuberculosis or histoplasmosis — an illness caused by a fungus in bird and bat droppings. This was particularly true in cases involving the most serious form of the disease. In two-thirds of cases in which other doctors found complicated black lung, Wheeler attributed the masses in miners' lungs to TB, the fungal infection or a similar disease.
- The criteria Wheeler applies when reading X-rays are at odds with positions taken by government research agencies, textbooks, peer-reviewed scientific literature and the opinions of many doctors who specialize in detecting the disease, including the chair of the American College of Radiology's task force on black lung.
- Biopsies or autopsies repeatedly have proven Wheeler wrong. Though Wheeler suggests miners undergo biopsies — surgical procedures to remove a piece of the lung for examination — to prove their cases, such evidence is not required by law, is not considered necessary in most cases and can be medically risky. Still, in more than 100 cases decided since 2000 in which Wheeler offered negative readings, biopsies or autopsies provided undisputed evidence of black lung.

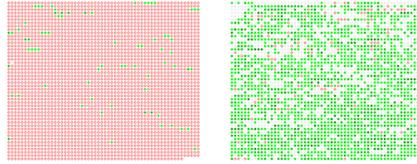
In an interview, Wheeler held strongly to his views. In his telling, he is more intellectually honest than other doctors because he recognizes the limitations of X-rays and provides potential alternative diagnoses, and he is adhering to a higher standard of medical care by demanding biopsies to ensure patients get proper treatment.

"I've always staked out the high ground," Wheeler said.

The university defended Wheeler, saying in a statement he "is an established radiologist in good standing in his field."



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*For decades, Dr. Paul Wheeler has led a unit of radiologists at Johns Hopkins who often are called by the coal industry to read X-rays in black lung benefits cases. The Center for Public Integrity identified more than 1,500 cases decided since 2009 in which Wheeler was involved, reading a total of more than 3,400 X-rays. In these cases, he never found a case of complicated black lung, and he read an X-ray as positive for the earlier stages of the disease in less than 4 percent of cases. Subtracting from these the cases in which he ultimately concluded another disease was more likely, this number drops to about 2 percent.*

University officials questioned the findings by the Center and ABC, requesting extensive documentation, which the news agencies provided. After initially responding, officials at Johns Hopkins did not answer most questions but instead provided a general written statement.

"To our knowledge, no medical or regulatory authority has ever challenged or called into question any of our diagnoses, conclusions or reports resulting from the ... program," the statement said.

After the Center and ABC again posed questions about documents showing that judges and government officials had challenged the opinions of Wheeler and his colleagues on numerous occasions, university officials sent the same statement again.

That statement also said, "In the more than 40 years since this program's inception, [Johns Hopkins radiologists] have confirmed thousands of cases to be compatible with [black lung]."

In some cases reviewed by the Center and ABC, Wheeler opined that an X-ray could be compatible with black lung but that another disease was more likely, ultimately grading the film as negative.

The news organizations asked the university how many times he had provided a truly positive reading. Johns Hopkins officials would not answer or clarify what they meant by "compatible."

Judges at varying times have called Wheeler's opinions "disingenuous," "erroneous," "troubling" and "antithetical to ... regulatory policy," court records show.

One judge dedicated an entire section of his [ruling](#) to the Johns Hopkins specialists. Wheeler and two colleagues "so consistently failed to appreciate the presence of [black lung] on so many occasions that the credibility of their opinions is adversely affected," Administrative Law Judge Stuart A. Levin wrote in 2009.

"Highly qualified experts can misread x-rays on occasion," he wrote, "but this record belies the notion that the errors by Drs. Wheeler [and two colleagues] were mere oversight."

But, to discredit his readings and award benefits to a miner, as Levin did, judges must identify a logical flaw or some other reason not to give his opinion greater weight than those of other doctors. Former judges said they knew certain doctors almost never found black lung, but said they were barred from taking these experiences in other cases into consideration. In four cases reviewed by the Center, judges who have questioned Wheeler have seen their decisions vacated by an appeals board.

Retired judge Edward Terhune Miller, who often saw Wheeler's opinions in cases before him, said he sometimes was compelled to deny claims even when he had serious doubts about the opinions of coal-company experts from Hopkins and elsewhere. Miners often were unable to provide enough evidence to

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overcome these opinions, and he wasn't allowed to take his personal knowledge of doctors' tendencies into account. "That's one of the frustrations in the process," said the former judge. "There's no doubt about it."

Wheeler said he is sure miners who don't have black lung are being wrongfully compensated. "They're getting payment for a disease that they're claiming that is some other disease," the doctor said.

He takes issue with a law passed by Congress in 1969 that was crafted to lessen the burden of sick miners while limiting coal companies' liabilities. Benefit payments for a miner start at just over \$600 a month and max out at about \$1,250 monthly for a miner with three or more dependents. Because these caps are low and miners are presumed to be at a particular risk for the disease, the system does not require they prove their cases beyond all doubt. Still, miners must show that they have black lung and that, because of it, they are totally disabled. About 85 percent of claims are denied at the initial level.

"I think if they have [black lung], it should be up to them to prove it," Wheeler said. To him, this means undergoing a biopsy. If miners don't submit to the procedure, he said, it suggests they may be afraid the results will show they have something other than black lung.

“

***"I think if they have [black lung], it should be up to them to prove it."***

— DR. PAUL WHEELER, RADIOLOGIST FOR JOHNS HOPKINS

Biopsies are rarely necessary to diagnose the disease and can put the patient at risk, according to the American Lung Association, the National Institute for Occupational Safety and Health (NIOSH), the Labor Department, a paper published by the American Thoracic Society and prominent doctors interviewed by the Center.

Told his higher standard of proof, which he maintains is ordinary medical practice, is not required by law, Wheeler held firm.

"I don't care about the law," he said.



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Relieved miner Steve Day at his West Virginia home. F. Brian Ferguson/Center for Public Integrity

### 'Victimized twice'

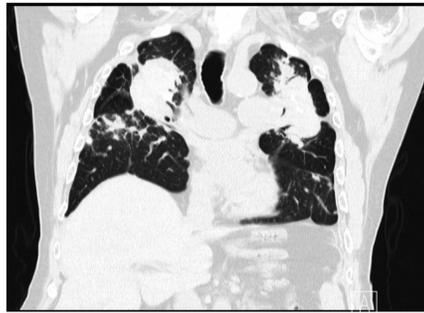
To people in the southern West Virginia town of Glen Fork, he is "Steve" — longtime miner, father of three, Vietnam veteran. To Dr. Paul Wheeler, from his vantage 400 miles away, he was "Michael S. Day Sr.," 58, another referral from corporate defense firm Bowles Rice LLP.

Wheeler has never been in a coal mine or met Steve Day. His opinion, though, proved crucial in Day's case.

In 2004, after more than three decades in jobs that exposed him to high levels of dust, Day's breathing worsened to the point his doctor urged him to get out of mining. In January 2005, he filed a claim for federal black lung benefits.

The Labor Department pays for a medical examination by a doctor from an approved list. Day unwittingly chose a doctor who commonly testifies for coal companies, yet even this physician diagnosed the most advanced stage of complicated black lung.

Then the opinions from Johns Hopkins began arriving.



This image, taken from a 2012 CT scan of Steve Day, shows a large mass in each lung. Dr. John E. Parker, who used to run the government's X-ray surveillance program, says they represent a classic case of complicated black lung.

A CT scan interpretation by Dr. John Scatarige, who is no longer at the university: Large masses in the lungs, probably tuberculosis, or maybe a fungal disease, or cancer. Black lung unlikely.

Two X-ray readings by radiologist William Scott Jr., with the university since the early 1970s: Large masses in the lungs, probably tuberculosis. Black lung unlikely.

And, most vitally, three X-ray readings and a CT scan interpretation by Wheeler: Large masses in the lungs, probably tuberculosis, histoplasmosis or a similar disease. Black lung unlikely.

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Peabody subsidiary Eastern Associated Coal Corp.'s chosen pulmonologist to review the evidence, Dr. Robert Crisalli, originally found black lung but changed his opinion after seeing Wheeler's interpretations. He adopted most of Wheeler's views and testified, "The basis for the conclusions primarily centers around the imaging, including the CT scans."

Day lost.

A spokesman for Peabody spinoff Patriot Coal Corp., which now owns the subsidiary that employed Day, declined to comment, as did a spokesperson for Peabody.

Like many miners, Day relied primarily on the opinion of the doctor who examined him for the Labor Department and the records from his treatment over the years. He was at a distinct disadvantage, squared off against the radiologists at Johns Hopkins.

In determining Day didn't have black lung, the Johns Hopkins experts relied on the same criteria they have recited in countless cases reviewed by the Center. Put simply, the white spots that show up on film must have a particular shape, appear in a specific area of the lung and follow a specific pattern.

At the Center's request, a physician not involved in the case, Dr. John E. Parker, reviewed Day's X-rays and CT scans taken between 2003 and 2012. Parker worked at NIOSH for 15 years, much of the time as director of the X-ray surveillance program and the program to certify qualified readers. He is now chief of pulmonary and critical care medicine at the West Virginia University School of Medicine, and travels the world teaching doctors to read X-rays in seminars, many for NIOSH and the American College of Radiology.

Parker was told only Day's name, age, number of years mining and the fact that the interpretation of the films was disputed.

**His clear-cut conclusion.** Complicated black lung. "Based on my findings in reviewing this case, and the classic nature of the medical imaging and history, I am deeply saddened and concerned to hear that any serious dispute is occurring regarding the interpretation of his classically abnormal medical imaging," Parker wrote. "If other physicians are reaching different conclusions about this case ... it gives me serious pause and concern about bias and the lack of scientific independence or credibility of these observers."

Told later that Day had lost his case, Parker was taken aback.

"It breaks my heart," he said. "This man has been victimized twice — once by the conditions that allowed him to get this disease and again by a benefits system that failed him."

#### Johns Hopkins experts help defeat hundreds of claims

The Center's review of thousands of cases suggests there are many more men like Day. Since 2000, miners have lost more than 800 cases after at least one doctor found black lung on an X-ray but Wheeler read it as negative. This includes 160 cases in which other doctors saw the complicated form of the disease.

George Hager, for example, worked in the mines for 37 years, and three doctors saw complicated black lung on his X-rays and CT scan. Three Johns Hopkins radiologists, including Wheeler, saw something else — perhaps tuberculosis or histoplasmosis. The judge noted the affiliation of the Johns Hopkins doctors and their "superior qualifications." Hager lost.

Douglas Hall's 27 years underground came to an end at the advice of his doctor; he couldn't walk 100 feet without struggling for breath. Four doctors read his X-rays as complicated black lung, but, again, three Hopkins radiologists, Wheeler among them, graded them as negative, finding tuberculosis or histoplasmosis more likely. Though tests for both diseases came back negative, Hall lost.

Keith Darago initially won twice. Three doctors saw complicated black lung on his X-rays and CT scans, and Administrative Law Judge Linda Chapman rejected attempts by the three Johns Hopkins radiologists to attribute the masses on the films to tuberculosis or a similar disease, particularly given Darago's negative tuberculosis test and lack of history of any other disease.

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But the Benefits Review Board, the highest appeals court in the administrative system, vacated the award of benefits twice and, at the coal company's lawyers' request, referred the case to a different judge. This time, the judge found the evidence on film to be a wash. Darago lost.

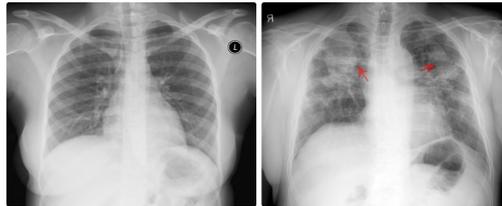
Some miners or their surviving family members continue to file claims, occasionally winning after their disease worsens or they die. Others simply give up, tired of fighting.

"I think it's a bad deal," said Rodney Gibson, another miner whose case followed a similar pattern. All the evidence of complicated black lung he presented wasn't enough. "They come out with a way of getting around it somehow," he said.

An X-ray of Steve Day's chest, taken in 2009, shows two large masses (indicated by arrows). On previous films, Dr. Paul Wheeler said the masses likely were caused by tuberculosis or a fungal infection from bird and bat droppings. A half-dozen doctors have interpreted the masses as complicated black lung. Dr. John E. Parker, who used to run the government's X-ray surveillance program, said this X-ray shows a classic case of the severe disease. Mouse over the X-rays to magnify the images. Images: [Yak Roman](#) (left), licensed [CC-BY-SA](#); courtesy of Steve Day family (right)

Normal X-ray

Steve Day's X-ray



**'Not using the system properly'**

Wheeler flips a switch, and a tall panel hums to life, emanating a white glow in the dark corridor where the Pneumoconiosis Section, as the group of Johns Hopkins radiologists is known, does its work. Papers bearing the letterhead of prominent corporate defense law firms sit at work stations, and stacks of folders in a storage closet have names of firms and coal companies written in Sharpie on their sides.

Wheeler places a series of chest X-rays against the panel and describes what he sees.

Small white spots obscure much of the lungs on one film, but they don't have the centralized "birdshot pattern" he's looking for. "I'd classify it as compatible with coal workers' pneumoconiosis," he says. "But I'd also say it certainly could be or more likely is histoplasmosis."



He moves to films showing large white masses. One doesn't have small spots surrounding it and is "pretty high [in the lung] — I would call it out of the strike zone," he says. He again suspects the fungal infection. "If you want to bet against histoplasmosis, you're going to lose an awful lot," he says.

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These X-rays, however, are not disputed films in a benefits case. They are the standard X-rays that the government says show pneumoconiosis — a family of disease that includes black lung and asbestosis, but not histoplasmosis, tuberculosis and similar illnesses. When reading for pneumoconiosis, government-certified readers are supposed to place the unknown X-ray next to these films; they are classic cases meant to be standards for comparison.



Wheeler questions this and says the classification system has “some quality issues.” He adds, “These are not proven.”

Experts like Wheeler must pass an exam every four years to retain their government certification. If a doctor were to classify these films as negative during that exam, the physician very likely would fail, said David Weissman, director of NIOSH’s Division of Respiratory Disease Studies, which sets the standards for how readings should be performed.

Wheeler, however, has continued to pass the exam for decades, most recently this April.

The form used in the U.S. and many other countries for interpreting X-rays contains boxes to grade what’s on the image and a comments field for further explanation. If spots appear on the X-ray, a reader is supposed to mark their size and shape, and then explain which diseases seem more or less likely.

When he reads X-rays for coal companies, however, Wheeler doesn’t do this. If he sees spots on the film but thinks another disease is more likely than black lung, he marks the film as negative. He typically describes the abnormalities in the comments section, explaining why they don’t meet his criteria for finding black lung. In case after case reviewed by the Center, his comments were almost identical.

Weissman said this approach is simply wrong.

“You’re supposed to grade what’s there,” Weissman said. “You’re not supposed to alter what the grade is based on what you think the underlying cause is. That’s not using the system properly.”

In a statement, university officials said the radiologists “adhere to the clinical standards of diagnosis noted in the guidelines” put forth by the International Labor Organization, upon which NIOSH relies.

Wheeler said he is being more responsible than other doctors by providing multiple possible diagnoses. He often grades the film as negative but says in the comments section that black lung is possible, but unlikely.

The practical effect of Wheeler’s readings: To rule out black lung. Judges may consider the comments he writes, but the key, in comparing Wheeler’s readings with others, is the negative numerical grade he assigns.

In depositions, he sometimes goes further to eliminate black lung as a cause of a miner’s failing health. “He doesn’t have [black lung],” he said in a 2004 case, for example. “[I]n no way is this [black lung],” he said in another.

Weissman said NIOSH often hears that some certified readers interpret X-rays the way Wheeler does and that others over-diagnose diseases. “It’s pretty frustrating sometimes when we hear of people that do well on the exam and then go out in the real world and do other things,” he said. “Absolutely that is a concern.”

The agency’s authority, he said, doesn’t go beyond education, training and administering the exam. People with complaints should contact the state medical board, he said.

#### **No, by the numbers**

There is an unmistakable pattern in Wheeler’s readings. The Center identified more than 1,500 cases decided since 2000 in which Wheeler read at least one X-ray; in all, he interpreted more than 5,400 films during this time.

The numbers show his opinions consistently have benefited coal companies.

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- Wheeler rated at least one X-ray as positive in less than 4 percent of cases. Subtracting the cases in which he ultimately concluded another disease was more likely, this number drops to about 2 percent.
- In 80 percent of the X-rays he read as positive, Wheeler saw only the earliest stage of the disease. He never once found advanced or complicated black lung. Other readers, looking at the same images, saw these severe forms of the disease on more than 750 films.
- Where other doctors saw black lung, Wheeler saw tuberculosis, histoplasmosis or a similar disease on about 34 percent of X-rays. This number shoots up in cases in which others saw complicated black lung, which is so severe it triggers automatic compensation. In such cases, Wheeler attributed the masses in miners' lungs to these other diseases on two-thirds of X-rays.

Asked if he stood by this record, Wheeler said, "Absolutely."

"I have a perfect right to my opinion," he added. "I found cases that have masses and nodules ... In my opinion, those masses and nodules were due to something more common."

When his views are questioned, Wheeler often shares anecdotes. He tells the story of performing an autopsy during his residency on a woman thought to have breast cancer; his examination revealed undetected tuberculosis. Other common stories include his father's severe illness from histoplasmosis and a colleague's bout with the infection after spending a rainy night in an abandoned chicken coop.

In a case decided in 2010, a doctor disputed Wheeler's narrow view of black lung, and the miner's lawyer asked Wheeler during a deposition whether he could cite medical literature to support his views.

"I don't think I need medical literature," Wheeler replied.

In a 2009 letter submitted in another case, Wheeler questioned two doctors who read X-rays as positive for black lung and wrote that he and a colleague who had provided opinions in the case "are clinical radiologists at one of the two or three best known hospitals in the world."

The judge was not impressed. "This self-serving, egotistical diatribe is unwarranted and very unprofessional," he wrote.

Wheeler took a similar approach in a recent interview, challenging the views of any doctor, judge or organization — including the Labor Department, NIOSH and the International Labor Organization — that contradicted his. He said he's never been told an interpretation of his was wrong and he'd admit a mistake only if a biopsy or autopsy showed black lung — and was performed by a pathologist with "proper credentials."

"I know my credentials," he said. "I'd like to make sure that the people proving me wrong ... have ... credentials as good as mine."

#### Proof in the tissue

In fact, tissue samples from miners' lungs have proven Wheeler wrong again and again.

The pathologists providing the interpretations were enlisted by the coal company in many cases, and they often came from well-regarded academic medical centers, such as Washington University in St. Louis and Case Western Reserve University, where Wheeler himself was a resident. Some helped write widely accepted standards for diagnosis of black lung with pathology and have been frequent experts for companies defending claims.

Wheeler's readings were negative even in some cases in which the company conceded the miner had black lung and chose to fight the claim on other grounds.

When clear pathology evidence did exist in cases reviewed by The Center, it tended overwhelmingly to show that the doctors who had found black lung — not Wheeler — were correct.

The American Lung Association, NIOSH, the Labor Department and a paper published by the American Thoracic Society say black lung usually can be diagnosed with an X-ray, knowledge of the miner's exposure to dust and studies of lung function. Biopsies, which Wheeler insists are "very safe," are invasive, risky and usually unnecessary, government officials and doctors said.

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Still, of the cases in which Wheeler submitted at least one negative reading, miners or their surviving family members submitted evidence from a biopsy or autopsy in more than 280 cases, a Center analysis found. Contrary to Wheeler's contentions, the pathology did not resolve most cases. In about half, the tissue evidence proved inconclusive or was disputed.

Of the remaining cases, 75 percent revealed undisputed evidence of black lung. In the other cases, the tissue did not show evidence of the disease, but, as the law states, this doesn't mean the miner didn't have black lung — only that it wasn't present on the piece of lung sampled.

In the cases in which pathology showed Wheeler was wrong, other X-ray readers saw black lung 80 percent of the time, and no interpretations outside of Johns Hopkins existed in another 12 percent.

Most times, then, only Wheeler and his Johns Hopkins colleagues failed to see black lung.

#### Diagnosis after death

Sometimes miners had to die to prove they had black lung.

George Keen worked 38 years in the mines and tried for 22 years to win benefits. At least two physicians interpreted his X-rays and CT scans as showing complicated black lung. Wheeler and his colleague Scott read them as negative — probably tuberculosis, they said. Keen lost.

Three years after the most recent X-rays and CT scans read by Wheeler were taken, Keen died. The company's chosen pathologist agreed the autopsy revealed complicated black lung.

John Banks, who started loading coal by hand at 17, had multiple claims denied. More than a half-dozen doctors saw black lung; Wheeler suspected cancer. When Banks died, pathologists looking at his lung tissue debated whether the disease had reached the complicated stage, but both sides agreed: He had black lung.

Emily Bolling suffered through much the same experience with her husband, Owen, who spent most of the last six years of his life on oxygen but wasn't able to win benefits.

"They would keep hiring more doctors and more doctors to read his X-rays, and we had just one," she said.

Wheeler read a 2002 X-ray as negative. Owen died in 2003, and two pathologists found that the autopsy showed black lung, allowing Emily to win her widow's claim. "It seems awful, but that's what it took," she said recently. "It's just wrong."

Ilene Barr is trying to win benefits following the 2011 death of her husband, Junior, who worked 33 years doing some of the dirtiest jobs in the mines. In his final years, his health progressively worsened. "He loved to do things around the house," Ilene recalled. "He had a garden. But he became so short-winded he couldn't do any of that. He ended up basically just sitting on the deck."

He lost claims in 2008 and 2010 after Wheeler read X-rays as negative, saying histoplasmosis was much more likely.

"We just couldn't believe that it was happening," Ilene said.

Four months after Wheeler's most recent opinion that Junior likely was suffering from the bird-and-bat-dropping disease, he died. Pathologists for both sides saw black lung on the autopsy. Ilene's benefits case is pending.

#### The Wheeler standard

Wheeler learned the strict criteria he applies from his mentor, Dr. Russell Morgan, a revered figure at Johns Hopkins. In the early 1970s, Morgan helped NIOSH develop the test to qualify as a "B reader" — a doctor certified to read X-rays for black lung and similar diseases. Wheeler served as one of his test subjects. The radiology department bears Morgan's name, and he went on to become dean of the medical school.

Morgan testified for companies defending a wave of lawsuits over asbestos-related disease. Wheeler testified before Congress in 1984, arguing that false

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asbestos claims were rampant and that plaintiffs should prove their cases by undergoing a biopsy. He asserted that similar problems existed in the black lung compensation system.

There is general acknowledgement now that X-ray evidence was misused in some asbestos claims. The black lung benefits system of today, however, is a different universe.

In some asbestos claims, plaintiffs won large verdicts or settlements, and lawyers got rich. For black lung, the **payments** are comparatively meager — the maximum monthly payment, for miners with three or more dependents, is about \$1,250 — and few lawyers will take cases because the odds of winning and ultimate compensation are low. Settlements are not allowed, and miners have to prove total disability caused by black lung, not just show a minimally positive X-ray.

Wheeler continues to express concerns similar to those he voiced in 1984. "It comes down to ethics," Wheeler said. "If you think it's appropriate for somebody with sarcoid to be paid for [black lung] because he has masses and nodules — do you think that's appropriate? I don't think so."

After Morgan's death, Wheeler took over the "Pneumoconiosis Section." Asked if he viewed himself as the coal industry's go-to radiologist, Wheeler said: "Dr. Morgan was the go-to guy. ... I've replaced him ... in the pneumoconiosis section, yes. ... I can view myself as the doctor for a number of companies, not just coal companies."

In depositions and during the recent interview, Wheeler has insisted he is relying on the criteria Morgan taught, praising his predecessor as an innovator and genius. His criteria, however, do not comport with mainstream views on black lung.

"When you take this very strict view, where you put in all these rules, none of which are a hundred percent, what will happen is you'll wind up excluding people that have the disease," NIOSH's Weissman said.

According to medical literature and experts consulted by the Center, black lung does not always fit the narrow appearance Wheeler requires. Shown a text, for example, that says the disease may affect one lung more than the other, Wheeler said: "I don't know where they get this idea. ... It's not what Dr. Morgan taught me."

In fact, the statement comes from the standards established in 1979 by the College of American Pathologists. The report was compiled by a group of eminent doctors, including some who have testified regularly for coal companies.

Doctors interviewed by the Center said they had seen many cases of black lung that did not fit Wheeler's standards. "You'll see a variety of different presentations," said Dr. Daniel Henry, the chair of the American College of Radiology's task force on black lung and similar diseases. "The image can vary."

In one **case** decided in 2011, NIOSH got involved at the request of the doctor who examined the miner for the Labor Department. Multiple doctors had diagnosed complicated black lung, but Wheeler had read X-rays as negative. The spots on the X-rays didn't follow the pattern he wanted to see, he'd said, histoplasmosis was more likely.

Two NIOSH readers, however, saw complicated black lung on the film, and Weissman wrote a **letter** saying Wheeler's views "are not consistent with a considerable body of published scientific literature by NIOSH." The miner won his case.

#### Assumptions and 'bias'

A pair of assumptions shapes Wheeler's views in ways that some judges and government officials have found troubling.

Former miner Gary Stacy's struggle for benefits lays bare the effects of these beliefs.

When he filed for benefits in 2005, Stacy was only 39 years old, yet three doctors believed his X-rays and CT scans showed complicated black lung. He had worked for almost 20 years underground and had never smoked.

Wheeler, however, read two X-rays as negative. He wrote that Stacy was "quite young" to have complicated black lung, especially since the 1969 law required federal inspectors to police that levels. Histoplasmosis was much more likely, Wheeler thought.

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A judge [denied](#) Stacy's claim in 2008, and it would take years of fighting and a rapid decline in his breathing before he won.

In reaching his conclusions about the cause of the large masses in Stacy's lungs, Wheeler drew upon beliefs that pervade his opinions: Improved conditions in mines should make complicated black lung rare, whereas, [histoplasmosis](#) is endemic in coal mining areas.

In case after case, Wheeler has said complicated black lung was found primarily in "drillers working unprotected during and prior to World War II."

Wheeler's contention contradicts a series of published studies by NIOSH researchers showing that the prevalence of black lung actually has increased since the late 1990s and that the complicated form increasingly is affecting younger miners. Wheeler contends these peer-reviewed studies aren't conclusive because they have not been confirmed by pathology.

Gary Stacy is the kind of miner NIOSH says it now sees more often. Just 47 today, he appears trim and healthy, but a few minutes of conversation reveal a different reality. His sentences are interrupted by hoarse gasps for breath.

Stacy now undergoes pulmonary rehabilitation to prepare for a lung transplant. As his illness worsened, the evidence became overwhelming, and his employer agreed to pay benefits.

The fact that nothing in Stacy's medical history indicated he'd suffered from histoplasmosis or tuberculosis didn't prevent Wheeler's readings from being credited in the 2008 denial. Someone could be exposed, show no symptoms and still develop masses that remain after the infection has fizzled out, Wheeler often has said.

This is theoretically possible, said doctors consulted by the Center, including an expert on histoplasmosis at the Centers for Disease Control and Prevention. But, doctors noted, in cases with masses as large as the ones Wheeler often sees on film, the patient likely would show symptoms and have some record of the disease in his medical history.

NIOSH's Weissman said the two diseases should rarely be confused on film. "The appearance of [black lung] is different from the typical appearance of ... histoplasmosis," he said. "That shouldn't be hard, in general, to make that differentiation."

Wheeler's main alternative suggestion once was tuberculosis, but he has switched to suggesting histoplasmosis more often. "Well, initially, I thought TB was ... causing these things," he said in an interview. "Yet many of those cases, he now believes, 'very likely were [histoplasmosis].'"

Could he be wrong again? "I could be," he said. "But I'd like to be proven wrong with biopsies."

In written opinions, judges have said Wheeler's assumptions seem to have "affected his objectivity" and "inappropriately colored his readings." Another wrote in 2011 that Wheeler had a "bias against a finding of complicated [black lung] in 'young' individuals."

In some cases, judges have questioned Wheeler's demands for biopsy proof and his speculative suggestions of other diseases. "The reasonable inference to be drawn from Dr. Wheeler's report and testimony is that he does not accept a diagnosis of [black lung] based on x-ray or CT scan alone," one judge wrote in 2010.

Another judge succinctly summarized Wheeler's opinion: "I don't know what this is, but I know it's not [black lung]."

#### Scraping to get by, struggling to breathe

Steve Day's wife, Nyoka, sleeps lightly. Most nights, they re-enact the same scene.

Steve sleeps upright in a recliner; if he lies flat, he starts to suffocate. Nyoka lies in bed in the next room over, listening to his breath and the hiss of the machine pumping oxygen through a tube in his nose. She waits for the sound — a faint gasp.

"I hurry in here, and I bend him over and say, 'Steve, cough,'" she said.



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"He'll try and get by without having to cough because it hurts. And I make him cough. I'll scream at him, 'Cough!'"

What



Retired miner Steve Day and his family outside their home in Glen Fork, WVa. (ABC News)



finally comes up is often black. They've made it through another night.

This is not the life they envisioned when Steve returned from Vietnam and they eloped. Both of their fathers had worked in the mines, and both had black lung. Before they got married, Steve made Nyoka a promise: He'd never go to work in the mines.

It wasn't long before he changed his mind, persuaded by his father: "He said that's the only way you can make good money," Steve recalled of the job that, in good years, earned him as much as \$55,000 or \$60,000. He worked just about every job underground. For much of his career, he ran a continuous mining machine, which rips through coal and creates clouds of dust.

"When he came out of the mines, all you could see was his lips, if he licked them," Nyoka recalled. "He was black except around his eyes."

After 33 years in the mines, he thought the cause of his breathing problems was obvious. So did his doctor, who is treating him for black lung.

The reports from Johns Hopkins floored Steve and Nyoka. There was nothing in his medical records to suggest he'd ever had tuberculosis or histoplasmosis, let alone a case so severe that it left behind multiple nodules and masses, including one occupying almost a third of one of his lungs.

Steve scowls at the mention of Wheeler's name. "The more I talk about him the madder I get," he said. "And the madder I get, my blood pressure shoots up."

Administrative Law Judge Richard Stansell-Gamm determined, based on the opinions of Wheeler and the pulmonologist who adopted most of Wheeler's findings, that Day had not proven he had black lung. The judge didn't come to any conclusions about what caused Day's severe illness.

He lost his case on May 31, 2011, and, three days later, the Labor Department sent Day a letter demanding \$46,433.50. The department had originally awarded Day's claim in 2005 and started paying benefits from a trust fund because the company's lawyers had appealed. Now that the initial award was overturned, the department wanted reimbursement for what it paid out during the six years it took for the case to reach a conclusion.

The department eventually waived the so-called "overpayment" after Day submitted documentation showing he had to support, to varying degrees, eight other people with only Social Security and a union pension.

"Each person of age tries to help but overall it isn't enough to survive on without borrowing," he wrote the department. "It has been very humiliating to have to do so, when everyone knows that I worked my life away from my children and my wife, in order to end up on full time oxygen for a company who isn't (decent) enough to acknowledge the damage 'their' job done to my body, my life, and my family."

Day has not given up hope of winning benefits, but, if he files again, he could find himself again having to overcome the opinions of Wheeler and his colleague at Johns Hopkins.

As he almost always does, Wheeler testified in Day's case that he should undergo a biopsy. Parker, the former NIOSH official who examined Day's X-rays

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and CT scans, and he'd advise against a biopsy because the risk of complications for someone with Day's level of disease is too great.

That leaves just one way, in Wheeler's opinion, to disprove him. Steve and Nyoka have already discussed it. "I done told her, 'If something happens to me, have an autopsy done on my lungs,'" Steve said.

Since he lost his case, Day's breathing has declined. He began full-time oxygen a year ago, but decided against a lung transplant. At 67, with his health problems, he likely would not be a good candidate.

Miners have developed a crude measure for how damaged their lungs are based on how upright they need to be to sleep.

"You start out with one pillow," Nyoka said. "Then you go to two pillows. Then three pillows, and that's supposed to be your top. Well, he went through that, and he got to where he couldn't breathe. So he got in the recliner, and he's just lived in that recliner for ..."

"Years," Steve interjected, staring out the window toward the tree-lined hillside.

"And now the recliner," Nyoka said. "It's not enough."

*Editor's note: Brian Ross and Matthew Mosk work for ABC News. Retired judge Edward Miller's daughter is employed by the network. The Center contacted him before ABC News joined the reporting for this story.*

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**BREATHLESS AND BURDENED**

**As experts recognize new form of black lung, coal industry follows familiar pattern of denial**

by [Chris Hamby](#)  
November 1, 2013



Mine: Ted Latask (second row, second from right) with the mine rescue team at the Robinson Run mine, now owned by Concol Energy, in northern West Virginia in 1988. He is wearing another mine's uniform, which doesn't bear his name. Courtesy of Ted Latask

**Reading Time:** 23 minutes

Ted Latask has black lung disease. For almost two decades, his breathing has been so bad he's been considered totally disabled. Even his former employer, the coal giant [Consol Energy](#), does not dispute those points.

Nineteen years after he first filed for federal black lung benefits, however, his case remains unresolved. What's really causing his impairment, doctors testifying for Consol contend, is a completely different and unrelated disease. To win his case, the former miner must show that his disability is caused by black lung.

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Though parts of his lungs show the dark nodules typical of the classic form of black lung, all doctors agree that his biggest problem is elsewhere, in the parts of his lungs that show severe scarring with a different pattern.

His case file, spread in piles, covers a conference table, but all of the medical reports, depositions, hearings, briefs and rulings center on one question: What caused the abnormal scarring that has consumed large portions of his lungs?

The fight over the answer to that question goes to the heart of the newest battle in a long-standing war between companies and miners. Latusck's legal tussle is the signal case in the latest effort by the coal industry to deny emerging scientific evidence and contain its liabilities, a strategy that has played out repeatedly over more than a century and locked multitudes of miners out of the benefits system, the Center for Public Integrity found as part of the yearlong investigation, "[Breathless and Burdened](#)."

Consol has hired radiologists, pathologists, pulmonologists and a statistician to examine Latusck, write piles of reports and attack a growing body of medical literature. His disease, they maintain, is a rare illness that appears in the general population and causes lung damage with the appearance seen in Latusck. The cause is unknown, but, they say, it definitely isn't coal mine dust.

Yet medical evidence increasingly has shown his pattern of scarring to be a previously unrecognized form of black lung.

Broad recognition of the illness' connection to coal mine dust could have significant financial implications for coal companies. The Center identified more than 380 benefits cases decided since 2000 in which the miner had evidence of this atypical presentation, and studies have shown the disease pattern to be present in at least 17 percent of some groups of miners examined.

Since Latusck first filed his claim in 1994, research increasingly has shown that coal and silica — the toxic mineral in much of the rock in mines — can cause the pattern of scarring he has. Government researchers at the National Institute for Occupational Safety and Health (NIOSH) and the National Institutes of Health (NIH), as well as other independent doctors, have linked the pattern to coal mining.

"It's certainly related to their work," said David Weisman, head of NIOSH's division of respiratory disease studies. "We're confident of that."

Yet, while other variants of black lung are defined explicitly in Labor Department regulations, Latusck's form is not, and doctors paid by the coal industry continue to testify that there is no evidence of any connection between mining and this form of disease. This leaves the complex medical issue to be argued case by case in the benefits system, which is often ill-equipped to address emerging science and typically favors coal companies and the well-paid consulting doctors they enlist.

A Labor Department spokesman said the agency doesn't think a regulation formally recognizing the form of disease as a type of black lung is necessary. Current [rules](#), the spokesman noted, allow miners to attempt to prove a relationship between their work and this variety of illness.

Experts interviewed by the Center, however, argued that explicitly stating such a relationship would lessen miners' burden, pointing to a previous rulemaking as a model. In hundreds of cases reviewed by the Center, miners with a disease pattern like Latusck's have faced particular challenges in proving their cases.

Latusck, a coal miner's son who grew up in an area of northern West Virginia dominated by Consol, has won four times before an administrative law judge, but appeals courts have vacated or reversed the decision each time.

Consol did not respond to requests for comment.

While courts have grappled with the complexities his case presents, Latusck's health has deteriorated. He has gone on oxygen and endured a lung transplant. The doctor who originally treated him on referral from Consol has testified against him twice, and many of the industry's go-to consultants have weighed in.

Yet he and his lawyer — the daughter of a coal miner who has toiled more than half her career on Latusck's case despite rules barring her from collecting a cent in fees until the case closes — press on.



Ted Latusck (left, with helmet) on his last day at work in April 1994. Courtesy of Ted Latusck

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"I know my case is going to set a precedent," Latusek said.

“

***"There is nothing in mining that makes it insanitary, and any insanitary conditions which may exist are doubtless closely related to the rum shop."***

— JOHN FULTON, ENGINEER AND COAL INDUSTRY REPRESENTATIVE, 1901

"Black lung" is not just one disease. Rather, it is a blanket term for a variety of lung diseases caused by breathing coal dust. As science has implicated coal dust as the cause of an increasing array of medical problems during the past century, coal companies have resisted, knowing broader recognition of the true effects of mining coal could place them on the hook for compensating more sick miners.

The coal industry's reaction to the potential expansion of its liabilities has followed a familiar pattern. For more than a century, the industry has sought to keep a narrow definition of black lung.

In the early 20th century, coal companies and sympathetic doctors argued that coal dust was harmless and actually protected miners' lungs from tuberculosis.

Since then, scientific advances have shown that breathing coal dust can harm different people in different ways.

One miner might develop the black nodules characteristic of coal workers' pneumoconiosis, the classic form of black lung. Another might find the air sacs in his lungs destroyed — emphysema — or the lining of his airways irritated and blocked — chronic bronchitis.

As the effects of coal dust have gained broader recognition, the industry in each instance eventually has had to accept the evidence. But, while these fights about classification have played out, sick miners have found it difficult, if not impossible, to win benefits.

Today, miners again are facing this strategy of denial and containment, this time over the pattern of scarring seen in the lungs of Latusek and hundreds of other miners with cases decided since 2000. In virtually all of the more than 380 cases identified by the Center, a doctor testifying for the coal company — or, in many cases, multiple doctors — blamed some variant of the disease idiopathic pulmonary fibrosis, known as [IPF](#), or a similar illness. This is the same scarring of unknown cause that Consol's doctors say Latusek has.

Miners lost more than 60 percent of these cases. Even when judges awarded benefits, the decision often hinged on an issue other than recognition of the abnormal disease appearance as black lung. Numbers on the success rate of miners at this level in all cases were not available for comparison.

In many cases, judges credited coal company experts and reached medical conclusions that flatly contradict the views of NIOSH and NIH. Judges must rely on whatever evidence a miner can produce, and finding doctors who can rebut the vehement assertions of the company's experts can be a challenge.

The particulars of Latusek's case offer a rare and nearly ideal opportunity to isolate the key question that could affect the claims of many other miners: Does coal mine dust cause his form of disease? Latusek never smoked. He doesn't have an autoimmune disease. He never underwent radiation treatment or took certain toxic drugs. He has no family history of the disease.

In other words, doctors can't blame his illness on these other potential causes. What he does have is a history of intense exposure to the potent mixture of dust generated by the most powerful machinery of modern mining.



A longwall mining machine operator watches as the massive device cuts through a coal seam in a mine near Cameron, W.Va. Dole Sparks/AP

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**“There are no healthier men anywhere than in the mining industry.”**

— COAL AGE, TRADE JOURNAL, 1915

Latusck's path to the mines was undeterred by the warnings of his father, who worked underground. “He never wanted me to go to the mines,” Latusck said. “He knew how dirty and dusty and dangerous it was.”

Aside from mining, though, there weren't many well-paying jobs in the area of northern West Virginia, near the town of Fairview, where Latusck and his older sister grew up. Consol's mines defied the landscape, tapping the rich Pittsburgh coal seam, the company remains one of the nation's top five coal producers today.

Latusck worked from the time he was 13, shedding his boyhood shyness as he carried out groceries from the local market and chatted up customers.

He breezed through high school, but found himself unprepared for the more rigorous workload at nearby Fairmont State University, especially with the two jobs he was working. After two years, he dropped out and went full time for a utility company that dug ditches and installed the power lines feeding into Consol's mines.

When he was laid off, he applied to work for Consol. In September 1970, he went underground, handling a variety of jobs. “I worked there about three months, and then Uncle Sam said it was my time to go,” he recalled.



Ted Latusck examines the hydraulic roof support — designed to prevent a cave-in on a longwall section — at a plant in England in 1993. Courtesy of Ted Latusck



Army photo of Ted Latusck taken in December 1970. Courtesy of Ted Latusck

Drafted into the Army, he received training in electronics and ended up stationed as a technician at a satellite communication site in New Jersey. He narrowly missed being sent to Vietnam. In July 1971, he married Donna, whom he'd met while at Fairmont State, and, six years later, they would have a daughter, Jennifer.

In December 1972, he returned to the mines. He quickly ascended the ranks, becoming a maintenance foreman and eventually longwall coordinator. This meant that, at 29, he was in charge of a crew running the massive moneymaking machine. A longwall's spinning shearer can hollow out mountains in little time. Consol made sure everyone knew the value of production, Latusck said: Every minute the machine wasn't running cost the company \$12,000.

He took pride in motivating his crew, keeping his own logs of production and comparing them with those of other shifts. “We actually outmined the other crews two to one,” he said.

Before long, he was promoted again: the company placed him in charge of all the longwalls at two mines. He sometimes would travel to Great Britain to see the factories that manufactured the machines, and he was always on call, once working 78 straight days. Another time, he spent virtually an entire week underground, coming up for a couple of hours a day to shower, eat and sleep.

At times, he lived in clouds of dust, he recalled. The roof would cave in, and his crew would have to cut through rock for days on end. Or the exit would be blocked by falling rock, rendering any attempt at ventilation pointless. “A lot of times, you couldn't see your hand in front of your face,” he recalled.

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Latusck's health problems first began to surface in 1989. He was short of breath, and he coughed constantly. A company physical turned up "one area of concern," as Conso's doctor put it, in 1990. The company referred him to a specialist, Dr. Joseph Renn III.

Latusck didn't know it at the time, but Renn frequently testified for coal companies defending black lung claims. He would later abandon his private practice and start a consulting firm, working almost exclusively for companies defending claims of occupational lung disease.

Renn diagnosed IPF. The reasoning behind the diagnosis is one that Renn and other doctors have repeated in case after case: Black lung causes round scars concentrated in the upper lungs. Latusck had irregularly shaped scars concentrated in his lower lungs, a pattern characteristic of IPF and related diseases. This conclusion absolved Conso of responsibility for his serious lung problems.

Though Latusck continued to work, the amount of oxygen in his blood continued to drop, his lungs couldn't transfer what he breathed in to his bloodstream. He struggled with any exertion and wheezed, especially when he was around dust.

While visiting a mine in Scotland in 1993, he had a moment of panic. He had to crawl 1,000 feet in an opening about four-and-a-half feet high. Halfway across, he lost his breath. "It felt like somebody had put a bag over my face," he recalled. When he got back to West Virginia, he had another episode while walking the steep stairs exiting the mine.

Latusck, in an interview and in court testimony, recalled a conversation with Renn in which the doctor said there wasn't much else he could do and he would likely die in a few years. Renn said privacy rules barred him from discussing Latusck's case, but he added that it is standard practice for him to discuss potential outcomes with patients.

In a legal filing, Conso's lawyer challenged Latusck's recollection, saying there was no mention of a prognosis in Renn's reports.

Not ready to give up, Latusck asked if there was anyone who could help him. Renn referred him to [National Jewish Health](#) in Denver, widely regarded as one of the nation's top centers on lung disease. Latusck began flying to see Drs. Constance Jennings and Cecile Rose.

Jennings had studied IPF and similar diseases while at NIH, and, when she first examined Latusck, she wasn't sure that she actually was looking at a case of the disease. It was 1993, and there had been little work on the potential connection to coal dust, but she had her suspicions.

In the report on her initial examination of Latusck in October, she noted that he had evidence of both classic black lung and IPF, then posed the question that would reshape his case: "Are the two processes related?"

"Someone could say peanut butter causes pneumonia," Dr. Gregory Fino said in a February 1997 deposition. "Well, show me in the literature that there is a statistically increased incidence of that occurring, and then I will not prescribe peanut butter to anybody."

Peanut butter was, in his analogy, coal dust, and pneumonia was the pattern of scarring in Latusck's lungs. Fino was adamant that the medical literature showed no connection between the two.

"I can't tell you what caused the idiopathic pulmonary fibrosis," he testified. "I can tell you what hasn't caused it: coal mine dust employment and coal mine dust inhalation."

“

*"We are not informed of any occupational diseases in the mining industry."*

—RALPH CREWS, COAL INDUSTRY LAWYER, BEFORE A FEDERAL PANEL, 1920

In recent decades, Fino has been perhaps the most high-profile among the cadre of doctors who testify regularly for coal companies. When a miner files a claim, he is entitled to an exam by a doctor from an approved list paid for by the Labor Department, but he also must submit to an exam by a doctor of the

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company's choosing.

Consol chose Fino to examine Latussek.

Fino was the industry's go-to doctor in the most recent battle over the definition of black lung. When the Labor Department proposed rules in 1997 to expand the list of illnesses potentially caused by breathing coal dust to include such diseases as emphysema and chronic bronchitis, the National Mining Association enlisted Fino.

Along with a biostatistician, he wrote a lengthy critique of the studies relied on by the Labor Department and said, "There is much bad science or loose terminology in these proposed regulations." In 2000, the agency finalized the rules, rebutting Fino's arguments in detail.

Fino and other doctors had testified regularly that smoking, not coal dust, caused these diseases that obstructed miners' airways. The approach by Fino and other doctors in Latussek's case was much the same — attack the science linking the disease to coal dust, identify an alternative cause.

Rem, for example, said of black lung and IPF, "There's no literature that relates the two."

Dr. W.K.C. Morgan, a veteran of previous battles over the definition of black lung dating to the 1960s, testified, "I think this is just wishful thinking."

Consol's lawyers hired a statistician to poke holes in the studies introduced into evidence by Latussek's lawyer, Sue Anne Howard.

Unlike many miners, however, Latussek had a tenacious lawyer and doctors with impressive credentials on his side, too.

Howard has represented sick miners since she began practicing law in 1982. The first black lung case she handled was her father's. She won, then watched him "die of black lung by inches," she recalled. As the hours spent on Latussek's case have amassed — time for which she's been barred from collecting any fees — she's tried to support her practice with other cases.

Jennings and Rose from National Jewish had become convinced that Latussek's disease was caused by his job. They acknowledged that the science was still emerging but laid out a rationale for their conclusion. The way his disease struck early, then smoldered for years, was very abnormal for IPF, they said, and a tissue sample showed tiny mineral particles in the area of his scarring. Consol's pathologists disputed this assessment of the biopsy evidence.

In a June 1997 decision, Administrative Law Judge Daniel Leland awarded benefits to Latussek. Consol's lawyers appealed, and, though the Benefits Review Board upheld Leland's decision, the U.S. Court of Appeals for the Fourth Circuit vacated the award in a divided opinion in 1999.

Referencing the studies introduced by Howard, the majority wrote, "At best, the articles offered tepid support for Dr. Jennings's, Dr. Rose's, and the [administrative law judge's] conclusion." The judges noted that Consol had more doctors on its side, and wrote, "Although we do not advocate counting the votes of various medical experts to reach a conclusion ... [w]e believe that such a disparity of opinion merits attention."

The dissenting judge chastised his colleagues for overstepping their authority and substituting their views of the medical evidence for those of the administrative law judge. "All we have here," he wrote, "is a situation where two or three more experts on one side dispute the findings of two or three fewer experts on the opposing side."

A 2002 law review article by Washington and Lee University Professor Brian Murchison singled out the decision as a "particularly disturbing" example of "judicial intrusion."

The ruling sent the case back to the same administrative law judge for reconsideration. The case dragged on, with the judge awarding benefits twice more, before it again arrived at the Fourth Circuit. Again, the majority questioned the medical evidence, this time reversing the award. And again, the dissenting judge — not the same one as in the prior ruling — blasted his colleagues for overreaching. Nonetheless, the 2004 decision ended Latussek's first claim.

Latussek was devastated. "My goal in life was to outlive Consol, to live long enough to know that I beat them in this case," he said recently. "I thought that I had. I was on cloud nine. And then it goes to the Fourth Circuit Court, and they take it all away from me."

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*“It doesn't matter what the damn thing is called. The man can't work, he's disabled.”*

— DR. L. E. BUFF, CARDIOLOGIST AND ADVOCATE FOR MINERS, 1969

If Conso's doctors were right, Latusck should have been dead before his case even reached the appeals court. Studies have shown patients with IPF typically die within five years of the onset of the disease. Latusck had first shown signs in 1989. Conso's experts acknowledged this was unusual but said it wasn't unheard of for some people to survive longer.

His age also raised questions. IPF rarely strikes people younger than 50. Latusck was 39 when his disease appeared.

Both of these characteristics — earlier onset and longer survival — were not unique to Latusck, as it turns out. Though this presentation would be abnormal for IPF in the general population, there is evidence that it is not unusual for certain people: miners.

As Latusck's case progressed, scientific interest in IPF grew. “Few lung disorders have seen a renewed investigative focus like IPF,” according to a 2003 report prepared by a group of doctors for the American Thoracic Society.

The lungs have a limited number of ways to respond when they come under attack. One response is the pattern of scarring in the lower lungs that often is diagnosed as IPF. But there are many diseases that cause essentially the same pattern and have a defined cause.

Increasingly, research has identified more causes of this pattern. Thus, people with a disease that previously would have been classified as IPF now are diagnosed with a more specific illness.

One prominent cause that has emerged in recent research: occupational dust exposure. Studies have linked the IPF pattern of scarring to breathing fine particles of everything from metal and cotton to coal and silica.

The phenomenon does not appear to be new. A 2012 study, by NIOSH epidemiologist Scott Laney and former NIOSH official Lee Peterson noted that research showing an IPF pattern in miners dated to 1974 but had been largely overlooked. Addressing the often-repeated view about the typical appearance of black lung — one that would exclude an IPF pattern — they wrote, “the scientific foundation for this expectation is unclear.”

Analyzing 30 years of X-rays from the agency's surveillance program, roughly half had a discernible pattern affecting only certain areas of the lungs in certain ways, they found. Of these, a striking 30 percent showed a pattern similar to Latusck's.

As researchers have looked more closely, they've seen that evidence of the disease's connection to coal mining — like the disease itself — appears to have been there all along. Studies in the 1970s and 1980s noted the pattern on X-ray and in tissue samples of coal miners. A 1988 study found the pattern on autopsies of between 15 percent and 18 percent of miners in South Wales and West Virginia and noted that the miners' disease had struck earlier and progressed more slowly than IPF.

The most recent edition of a key medical textbook on lung diseases, released in 2005, describes the appearance of the pattern in miners and says, “It is important to be aware of this entity as many cases are inadvertently diagnosed as idiopathic pulmonary fibrosis.”

Earlier this year, a group of doctors described the pattern as a recognized form of black lung in a [paper](#) for an



Ted Latusck on his 40th birthday at the mine office in Fairmont, WV, in September 1990. By this time, signs of disease already had appeared — a very early onset if he had the illness that doctors identifying for his employer diagnosed.  
Courtesy of Ted Latusck



This X-ray shows scars in the upper portions of the lungs — the pattern widely acknowledged as typical for black lung. Over time, however, science has shown that breathing coal mine dust can affect a miner's lungs in ways that don't produce this classic appearance. NIOSH

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American Thoracic Society journal. "The spectrum of lung disease associated with coal mine dust exposure is broader than generally recognized," the physicians wrote.



Doctors testifying for coal companies counter that this body of research is far from conclusive, saying it fails to show a direct causal relationship. And, they say, the studies failed to control for other potential causes, including smoking, or were skewed because participants were not randomly selected. Some of the same doctors made similar arguments in the 1990s about evidence connecting coal mine dust to diseases such as emphysema and chronic bronchitis.

"There's no doubt that we need to learn more," NIOSH's Weissman said, "but the excess burden that you see in coal miners is much above what you would see in the general population. Even if we don't know all of the exact details about how coal miners get that, I think it's pretty clear that it's associated with the unique exposures that they have."

Former NIOSH official and current West Virginia University professor Petionok said the evidence of the connection is becoming overwhelming. "It's coming to the point where it will just not be controversial," he said.

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*"The current norm is the contest of physician's reports. If this exercise ever had a fresh, truth-seeking outlook, it has long since faded."*

— CIRCUIT JUDGE K. K. HALL, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, DISSENTING OPINION, GRIZZLE V. PICKLANDS MATHER & CO., CHSOLM MINES, 1993

A different story, however, is playing out in the benefits system. Just in cases decided since 2000, miners showing this pattern of disease have lost at least 236 times, a Center review of hundreds of cases found.

The administrative law judges who decide cases can find themselves in a difficult situation when a miner with a disease pattern like Latusek's files a claim. A miner may not have access to a doctor who can argue persuasively — or who even knows — that the pattern can be caused by coal mine dust. Coal companies, on the other hand, have no shortage of doctors who argue emphatically and in great detail that there is no connection.

In several cases reviewed by the Center, the doctor who examined the miner on behalf of the Labor Department noted the IPF pattern but apparently didn't consider the possibility it was caused by his work. In other cases, doctors offered equivocal opinions that, while perhaps scientifically responsible, were overwhelmed by the certainty expressed by company doctors.

In a pair of cases, for example, Dr. Donald Rasmussen, who typically testifies for miners, expressed basically the same view: The patient had evidence of an IPF pattern, which has many possible causes but is much more common in coal miners. This, combined with his breathing impairment and exposure history, made it likely that dust was the cause of his scarring.

One judge considered Rasmussen's opinion "logical" and "well documented" and awarded the miner benefits. The other judge found it "not persuasive" and "not sufficient evidence of causation," denying the miner benefits.

Coal company doctors, on the other hand, often provide categorical statements. In a case decided in 2004, Dr. Lawrence Repeher attacked the miner's doctor, saying, according to the judge's paraphrase, "Dr. James made up a heretofore nonexistent disease that apparently only Dr. James recognizes."

In a case decided in 2007, Dr. George Zaldivar testified, "[Black lung] never has been linked with this kind of impairment and abnormality." Dr. Kirk Hippensteel testified in a case decided in 2008, "It is a disease of the general public that isn't precipitated by some ... exposure to something like coal dust, silica dust."

Each time, the miner lost.

Read such statements by coal company doctors, NIOSH's Weissman responded, "Well, goodness, that would be a surprise to me."

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Former administrative law judge Edward Terhune Miller said he handled some cases in which a doctor testifying for the company called the miner's disease IPF.

"I don't like it," he said. "When the doctor says, 'I don't know what it is, but it's definitely not X,' and he's coming from a known direction, I confess I take it with a grain of salt. Now, whether or not in a written decision I can deal with it in some effective way is another question entirely because I'm not allowed to say, 'That's not a reasoned analysis.'"

Indeed, judges are barred from substituting their medical opinions for those of witnesses. They need the miner to present evidence to overcome the company doctors' statements — a steep climb in a system where claimants are typically overmatched.

Before the Labor Department issued [regulations](#) in 2000 explicitly stating that diseases such as emphysema and chronic bronchitis can be caused by coal mine dust, company doctors frequently testified that these illnesses were never attributable to work in the mines.

Since 2000, most have changed their views. If they stick to their previous dogmatic assertions, a judge can give the opinion no weight. Doctors still can argue that smoking is a more likely cause in a particular case, but they cannot say coal dust is never a possible cause.

Miners' lawyers say this has made it easier to win some cases, and numerous doctors interviewed by the Center said the Labor Department should issue rules to recognize explicitly that an IPF pattern can be caused by coal mine dust.



**“Experts hired exclusively by either party tend to obfuscate rather than facilitate a true evaluation of a claimant's case.”**

— U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, *WOODWARD V. DIRECTOR, OWC*, 1991

A Labor Department spokesman said such a regulation would be unnecessary because miners already can try to prove a link between the pattern and their dust exposure. Nonetheless, experts interviewed by the Center argued that formal recognition would set ground rules and help miners who didn't have access to highly qualified experts who could attempt to draw such a connection.

"The law favors standards," said Howard, Latusek's lawyer. "Right now, with respect to [this form of disease], we have no standards. ... It just becomes, unfortunately, many times a matter of which doctor writes a better report, not which doctor offers the right opinion."

Latusek was unconscious for the entirety of his 35th wedding anniversary. He awoke the next day, July 4, 2006, with a tube in his throat. He was confused, panicked. He tried to pull the tube out, but his arms were strapped down.

For two days, machines aided his breathing. When doctors removed the tube, they told him to take a deep breath.

"It was magic," Latusek recalled. "I'd never felt air go in so easy. It was a beautiful feeling. I could actually breathe in deep. For years, I couldn't do that."

He had a new lung, thanks to an organ donor in Connecticut and a team that battled a malfunctioning airplane and torrential storms to get it to him.

The past few days had been frenzied. Latusek and his wife were in Pittsburgh to



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celebrate their anniversary. They were in bed at a hotel when someone from the hospital called at 12:15 a.m. — a lung had become available.

Throughout the morning and into the next day, nurses and doctors prepared him as they waited for the lung to arrive. At 7:30 p.m., they wheeled him into the operating room.



The lung, however, wasn't there. It was supposed to be coming by plane, but the aircraft's door wouldn't close. It was moved to a helicopter, which was grounded en route by bad weather. An ambulance finally got the lung to Pittsburgh, and doctors worked throughout the night.

Latusak still had one bad lung, but he could breathe on his own again. For about a year, he'd needed an oxygen tank. Tests showed his lung function continued to decline.

His deteriorating health had put his pursuit of benefits on hold. On his behalf, Howard had filed a petition to modify the previous denial in January 2005, but, as his transplant grew imminent, progress had slowed.

As he recovered from the surgery, his case began to inch forward again. This time, Howard was armed with advances in scientific knowledge thanks to renewed interest in IPF.

Jennings had left National Jewish, so Latusak began to see Dr. James Dauter at the University of Pittsburgh Medical Center. He was director of a hospital unit that specialized in treating diseases such as IPF. Yet he, too, became convinced that Latusak's scarring was caused by dust in the mines.

"In the last ten years, our thinking about [IPF and similar diseases] has undergone a tremendous transformation," he testified in 2011. Rose noted in a deposition a few months later, "There's a huge body of science that has emerged since 1995."

Consol had no trouble finding experts who maintained the studies were preliminary and flawed.

Remm again insisted his former patient had a disease of unknown cause. By now, he was doing only consulting work and, according to his testimony five years earlier, charging \$700 an hour. Asked during a deposition if Latusak's scarring was related to breathing coal mine dust, Remm testified, "There is absolutely no scientific literature that would support that statement."



Ted Latusak shows the scar from his lung transplant in 2006. Courtesy of Ted Latusak

He has given similar opinions in at least 30 cases decided since 2000, a Center analysis found. In an interview, Remm, who is winding down his consulting work and preparing to retire, said he now believes it is possible for coal mine dust to cause a pattern like that seen in IPF. He said he has made such a diagnosis, though he wasn't sure when or how many times. The Center was unable to find any of these diagnoses in court records.

In the past decade, Dr. David Rosenberg has emerged as a primary consultant for coal companies and one of its staunchest debunkers of science related to the connection of coal mine dust and IPF. Rosenberg is an assistant clinical professor at Case Western Reserve University and is affiliated with the University Hospitals system in Cleveland.

In a 2012 deposition, Rosenberg described the volume of his work for coal companies, and conservative estimates of his fees approached \$1 million a year. He testified he didn't know how much he earned from the industry, but that it was "obviously a significant amount."

In Latusak's case, as in others reviewed by the Center, Rosenberg went study by study, critiquing each. One failed to control for smoking, he said. Others weren't designed properly. Overall, the studies raised hypotheses but offered no proof of a causal relationship.

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His conclusions went further. "We know that coal mine dust exposure doesn't cause this condition," he testified.

Rosenberg has offered a similar opinion in more than 60 cases decided since 2000, the Center found. In these cases, the miner lost about 60 percent of the time. Rosenberg did not respond to calls and emails requesting an interview.

Fino, who examined Latusek some 15 years earlier, was not involved in his second claim. In a recent interview, he said he didn't recall the case but now believes it is possible that a disease pattern like Latusek's could be caused by coal mine dust.

"I did change my opinion," Fino said. "I go by what the medical literature says."

He said he has made this diagnosis in some cases. The Center's review of hundreds of court decisions did not identify any such cases, but did find about 100 decided since 2000 in which he diagnosed IPF or a similar disease.

In May 2012, Administrative Law Judge Thomas Burke [awarded benefits](#), crediting Latusek's doctors and the studies supporting their claims. This August, however, the Benefits Review Board delivered [another setback](#). It upheld most of Burke's decision but remanded the case, saying he needed to offer a better explanation of why he didn't credit the opinions of two of Consol's doctors.

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**"The first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource — the miner."**

— FIRST SENTENCE OF THE 1969 FEDERAL COAL MINE HEALTH AND SAFETY ACT

Latusek has endured countless complications and indignities during his two-decade fight for benefits. Some drugs made his hair fall out or caused rectal bleeding. Others have caused severe depression and destroyed his kidneys, which will require a transplant in a few years.

A devout Methodist, he sees possible meaning in his suffering. What he can't shake is a deep sense of betrayal.

For Consol, he put in 60- or 70-hour weeks regularly, sometimes more. The team he supervised in the 1980s brought out, on average, about \$70,000 worth of coal per shift, he estimated. He's undergone three knee operations and had two fingers reattached after machinery sliced them almost completely off.

He still has the article from a company publication highlighting a cost-saving discovery he'd made and pictures of him examining machinery for Consol in England or posing with fellow members of a mine rescue team. His email address still begins "L.longwall."

"I was loyal to the company," he said, "but the loyalty wasn't there for me."

In 1994, after the company received a letter from Latusek's doctors saying he needed to be moved to an above-ground job because of his health, his managers offered him a personnel job. It would have meant a longer drive and 40-percent pay cut, he recalled.

"I felt like somebody just put a knife in my gut," he said. "I told my wife: 'I can take the lung disease because a lot of that's my problem. I went in that mine and ate that dust and knew better. I should have known better, but I thought I was invincible. But I always thought Consol would take care of me.'"

Now, his case is before an administrative law judge once more, likely to return to the Fourth Circuit court — a trip that could take years.



Ted Latusek with his wife, Donna, and daughter, Jennifer, in 2000. Courtesy of Ted Latusek

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"If I live long enough to win this case and others that deserve it are awarded benefits because of it," he said, "the suffering I went through would be all for the good."

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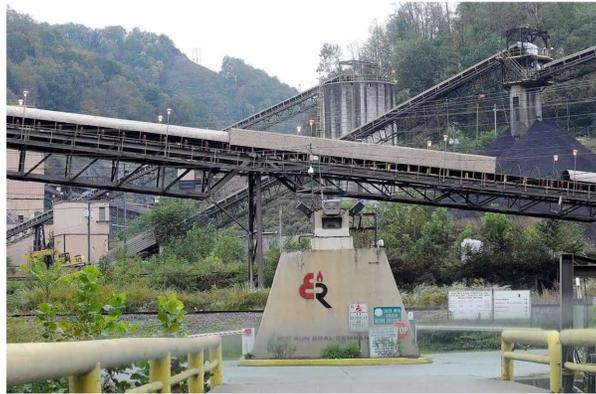
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**BREATHLESS AND BURDENED**

**Coal industry's go-to law firm withheld evidence of black lung, at expense of sick miners**

by **Chris Hamby**  
October 29, 2013



An entrance to the mining complex near Sylvester, W.Va., where Gary Fox worked for part of his career. *F. Brian Ferguson/Center for Public Integrity*

**Reading Time: 35 minutes**

BECKLEY, W. Va. — The stately, wood-paneled chamber in the federal building here unsettled Gary Fox and his wife, Mary. Fox was used to the dusty caverns of the mines in the southern part of the state, where he'd spent more than 25 years working underground in the heart of Appalachian coal country. They had never been in a courtroom before.



It had been at least 15 years since Fox first noticed signs of black lung disease. It started with shortness of breath. Then a cough that yielded black mucus. By 1999, his symptoms convinced him to apply for federal benefits. A doctor certified by the U.S. Department of Labor examined him and diagnosed the most severe form of the disease, known as complicated coal workers' pneumoconiosis. The government ordered his employer, a subsidiary of behemoth Massey Energy Co., to begin paying him monthly benefits, but, as is

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almost always the case, the company appealed.

Gary and Mary now found themselves visitors in a foreign world — one populated by administrative law judges who must make sense of reams of medical evidence, sophisticated legal arguments and arcane rules; coal-company lawyers who specialize in the vagaries of the system and know how to attack claims; and doctors who consistently find cause to diagnose almost anything but black lung.

Among the most prominent denizens of this world are the attorneys in the federal black lung unit of the law firm [Jackson Kelly PLLC](#). For almost two centuries, the firm has served the coal industry. It is the go-to place for many of the industry's giants when they want to beat back a miner's claim for benefits.

Jackson Kelly, with offices throughout Appalachia, as well as in Denver and Washington, D.C., defends companies accused of polluting the environment, marketing dangerous drugs or discriminating against workers. It helps corporations avoid regulations, drafts bills and lobbies legislators. Its builtiwick, though, is mining. *U.S. News & World Report* recently named it the nation's top firm in mining law. Jackson Kelly's name is on the lips of clinic workers, miners and lawyers throughout Appalachia and is emblazoned atop an office overlooking the Monongahela River in Morgantown, W. Va.

Now, with government scientists documenting a resurgence of black lung disease, the firm's legal strategy — including, the Center for Public Integrity found, a record of withholding evidence — could have significant consequences for sick miners and their families.

On this September morning in 2000, in the courthouse named for longtime Sen. Robert C. Byrd, an experienced Jackson Kelly attorney sat at one table. At the other, Gary and Mary sat alone, having tried unsuccessfully to find a lawyer. This imbalance is not uncommon, as claimants' attorneys have fled the federal black lung system in recent decades. Time and money are on the side of the coal company, which can hire scads of experts and drag cases out for years or decades. Miners' lawyers are legally barred from charging claimants any fees, and the payoff, in the rare event of a win, is relatively meager.



The Robert C. Byrd Federal Building and U.S. Courthouse in Beckley, W.Va., where Gary and Mary Fox, unable to find a lawyer, faced a seasoned Jackson Kelly attorney during a 2000 hearing. (GSA.gov)

Tall, lean and stoic, Fox, then 50, answered the judge's questions with quiet deference — "Yes, sir" and "No, sir." His brief testimony, along with the report from the examination paid for by the Labor Department, constituted virtually his entire case. Then it was Jackson Kelly's turn. Exhibit after exhibit became part of the record — medical reports, depositions, résumés of eminent doctors who'd reviewed the evidence.

More important, however, was what didn't make it into the record. Two years earlier, doctors had removed a suspicious mass from Fox's lung. The purpose had been to rule out cancer, which the hospital's pathologist had done. There is no evidence he looked for signs of black lung, or even that he knew Fox was a miner. Unknown to Fox, however, Jackson Kelly had obtained the slides of his lung tissue and sent them to two pathologists in its usual stable — doctors whose opinions typically supported the firm's case.

This time Jackson Kelly didn't get the answer it wanted. Both pathologists wrote reports indicating the mass likely was complicated black lung — a finding that, if credited by the judge, automatically would have won the case for Fox.

The firm's lawyers could have accepted the opinions of the doctors they'd relied on so many times before. They could have conceded that Gary's case had merit and agreed to pay him and Mary \$704.30 a month, allowing him to escape the dust destroying his lungs. Even if they chose to fight the claim, they could have allowed their experts to see all of the pathology reports as they formed their opinions.

None of that is what the lawyers at Jackson Kelly did. Instead, the firm withheld the reports; Fox, the judge and the firm's own consulting doctors had no idea they existed. In the months that followed, a team of Jackson Kelly lawyers built a case around the hospital pathologist's report and its vague diagnosis of "inflammatory pseudotumor." They encouraged the court and their own consulting doctors to view the report as the sole, definitive account of what Fox's lung tissue revealed. Even one of the doctors retained by Jackson Kelly originally thought Fox had black lung. After being given the pathologist's report, he changed his mind.

Relying heavily on the pathology report, a judge denied Fox's claim for benefits in 2001, leaving



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him few options. He had a family to support, and he needed health insurance because Mary had a chronic illness. He went back to the mine, his health deteriorating. For years, no one but the firm knew of the powerful evidence that he had the severe disease and should get out of the mine's dusty atmosphere immediately.



What happened to Gary Fox was not the result of a rogue attorney or singular circumstances. It was part of a cutthroat approach to fighting miners' claims that Jackson Kelly has employed to great effect for decades, an investigation by the Center for Public Integrity has found. Some of the firm's tactics go beyond aggressive advocacy, crossing into unethical behavior, according to current and former judges, lawyers and state disciplinary officials. As a result, sick and dying miners have been denied the modest benefits and affordable medical care that would allow them to survive and support their families.

The role of lawyers in orchestrating sophisticated legal strategies to defeat claims for benefits is just the first chapter in the story of a system in which well-paid specialists thrive as miners struggle, the Center's yearlong investigation, *Breathless and Barred*, found. Coal companies rely on a cadre of doctors with prestigious affiliations, including a unit at the nation's top-ranked hospital, to trump the opinions of miners' physicians. Experts for hire continue a century-old tradition: denying scientific evidence that black lung can assume different appearances in different people, locking an entire class of sick miners out of the benefits system.

Jackson Kelly, documents show, over the years has withheld unfavorable evidence and shaped the opinions of its reviewing doctors by providing only what it wanted them to see. Miners, often lacking equally savvy lawyers or even any representation, had virtually no way of knowing this evidence existed, let alone the wherewithal to obtain it.

**By the numbers: respiratory deaths, 2000-2010**

55,421	All work-related lung diseases
29,002	Mesothelioma, a form of cancer caused by breathing asbestos fibers
26,632	Pneumoconiosis, diseases in which dust, such as coal, causes scarring of the lungs

Source: [NIOSH](#). Note: Some deaths may be from multiple causes

In the rare cases in which miners' lawyers have pushed for access to these materials and a judge has ordered disclosure, Jackson Kelly has fought back aggressively, arguing that it has the right to withhold them. The firm has asked higher courts to intervene and accused judges of bias. It has defied court orders, knowing administrative law judges have no contempt powers to enforce their commands, or conceded the case rather than turn over evidence.

In published decisions, judges have called the firm's defenses of its actions "ludicrous" and "flimsy at best." "This is pretty shocking," a current judge wrote of Jackson Kelly's behavior in a 2009 email obtained by the Center. "It appears to represent a long-standing pattern of misconduct."

Still, judges generally haven't been receptive to arguments that Jackson Kelly's handling of a particular case is symptomatic of anything broader or that disciplinary action is warranted.

Fox's case, still unresolved, could change that. A judge deemed Jackson Kelly's actions in the case a fraudulent scheme that threatened the integrity of the judicial system. A split appeals court vacated that ruling, and the decision is now on appeal. After the Center contacted the West Virginia Office of Disciplinary Counsel and asked whether action would be taken, the office opened investigations into three Jackson Kelly lawyers who were involved in Fox's case. To date, they have not been charged with any wrongdoing.

The judge who denied Fox's claim in 2001, Edward Terhune Miller, recently retired and, in an interview with the Center, learned what had been shielded from him more than a decade earlier. His eyes widened, and, for a moment, he was speechless.

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"I'm utterly dumbfounded," he said. "I just cannot conceive of attorneys doing that. ... That's really misleading the court. It's misleading the witnesses. It's tantamount to the witness testimony."

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***"I'm utterly dumbfounded. I just cannot conceive of attorneys doing that. ... That's really misleading the court. It's misleading the witnesses."***

— RETIRED ADMINISTRATIVE LAW JUDGE EDWARD TERHUNE MILLER, AFTER LEARNING EVIDENCE HAD BEEN WITHHELD FROM HIM MORE THAN A DECADE EARLIER.

Jackson Kelly's general counsel, on behalf of the firm and the individual attorneys contacted by the Center, declined repeated interview requests and would not discuss specific cases or general practices. In court filings, the firm has argued that there is nothing wrong with its approach and that its proper role is to submit the evidence most favorable to its clients.

A spokesman for Alpha Natural Resources, which purchased Massey Energy and is now opposing Fox on appeal, declined to comment on the case while it is ongoing.

Until now, Jackson Kelly's conduct in black lung cases has remained largely buried in voluminous files that are confidential because of the private medical and financial information they contain.

Over the past year, however, the Center has identified key cases and obtained written permission from miners or their surviving family members to view their entire case files. These 15 files span 40 years and include hundreds of thousands of pages. The Center also reviewed the limited publicly available information on dozens more of the firm's cases.

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In court decisions and emails obtained by the Center for Public Integrity, some judges have criticized Jackson Kelly's approach in federal black lung benefits claims.

These documents reveal a struggle that has been waged out of public view for more than three decades between a handful of lawyers representing miners and the nationally prominent firm. In at least 11 of the cases reviewed by the Center, Jackson Kelly was found to have withheld potentially relevant evidence, and, in six cases, the firm offered to pay the claim rather than turn over documents as ordered by a judge.

Other workers' compensation programs use a panel of independent medical experts, and some judges have suggested rules requiring both sides to disclose all of their medical evidence. Such suggestions have fallen flat in the federal black lung system, where fights over evidence play out on a case-by-case basis.

The integrity of the program created more than 40 years ago is arguably more important now than in years past. Government researchers have documented a revival in the disease since the late 1990s, and the number of claims filed with the Labor Department has increased in recent years. After decades of decline in the disease's prevalence, government surveillance now indicates that more than 6 percent of miners in central Appalachia are afflicted with black lung, which is increasingly affecting younger miners and taking a new, more aggressive form. Researchers suspect this is an undercount.

Though conditions have improved since landmark [1969 legislation](#), today's roughly 85,000 U.S. coal miners face new dangers posed by an increasingly toxic mixture of dust generated by advanced machines that rapidly chew through coal and rock. For an average wage of about \$25 an hour, they risk explosions, rock falls, fires and disease.

In the past five fiscal years, the Labor Department has issued initial decisions in more than 23,000 claims, and the proportion of miners who win their cases remains low. During the 2012 fiscal year, about 14 percent of claims led to an award by the Labor Department at the initial level. The real number, after appeals, is likely lower, though no definitive statistics are available.

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Coal companies appeal almost every award, and this is when lawyers like those at Jackson Kelly typically develop mounds of evidence. Even if a miner prevails before a judge, the decision must pass an administrative appeals board with a record of vacating awards, often for highly technical reasons. Four of the board's five members were appointed under the Reagan or George W. Bush administrations.

The administrative court system, originally meant to benefit miners, has evolved into a byzantine maze of seemingly endless litigation with its own rules and peculiarities that can befuddle even experienced lawyers. Much more than in civil court, the balance of power is tipped in favor of defendants, and cases receive little outside scrutiny.

Fewer than one-third of miners have a lawyer at the initial stage of their cases, Labor Department statistics show. Coal companies and their insurers, however, are almost always represented by lawyers who specialize in black lung claims.

As perhaps the preeminent federal black lung defense firm, Jackson Kelly's legal strategy offers a window into an opaque, highly technical world that touches thousands of lives each year. In the cases reviewed by the Center, the firm has argued that its tactics are entirely proper. Lawyers and judges have said the behavior revealed in these known cases likely has occurred on a widespread basis. "They played hardball," recently retired judge Daniel Leland told the Center, calling the firm's approach "an all-out effort to win every case."

But in Gary Fox's case, events unfolded that the firm's lawyers may not have anticipated. Unlike many miners, Fox eventually would connect with a tenacious lawyer — a carpenter-turned-clinic-worker-turned-attorney practicing out of his home in rural southern West Virginia. These two men would challenge the powerful firm. Even as coal dust consumed his lungs and he waited for a transplant he hoped would save his life, Fox planned to fight.

## I. Discovery

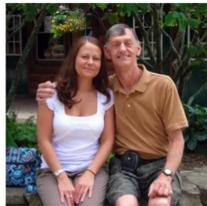
### Good money, at a price

Gary Nelson Fox almost never missed work. Not when he had a fever of 103 degrees. Not when falling rock shattered his ankle. Not when he'd work days on end partially submerged in dank water, arriving home soaking wet each night, or when he'd contort his 6-foot-2-inch frame to work in openings just a few feet high, stooping or crawling for nine-hour shifts.

He'd grown up poor, and he wanted a more comfortable life for his family. Mining was the best money around.

Born in 1950, he eventually earned a GED and finished two years of college. In 1970, he was shipped to Vietnam, where he drove a tractor-trailer for the Army. After sheet metal crushed his foot, he was sent home. In 1972, he married Mary Lynn Smallwood, whom he'd met before deploying overseas. Four years later, they had a daughter, Terri.

Fox worked for a few years driving a truck for companies like Coca-Cola and Heckley Oil. In 1974, he went underground, signing up with Itmann Coal Co. For some 13 years, his main job was to control a continuous mining machine, which uses a spinning drum head studded with teeth to tear through coal seams, generating clouds of dust. When he went to work for Birchfield Mining Co. in 1987, he switched to roof bolting. After a new area was carved out of the earth, he was among the first in, using a machine to drive rods into the unstable rock above and pin it to higher, more secure rock. He continued bolting when he went to work for the Massey subsidiary Elk Run Coal Co. in 1993.



Gary Fox and his daughter, Terri Smith  
(Courtesy of Terri Smith)



Appalachian coal miner Gary Fox's widow, Mary Fox  
(Chris Hanby/Center for Public Integrity)

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For most of his 30-plus years underground, he worked in the jobs that expose miners to the highest concentrations of dust, commanding higher pay and posing greater risk of developing black lung. Six-day weeks were the norm.

He pushed Terri to excel in school and to learn to take care of herself. When she turned 16, she wasn't allowed to drive until she could change the tires and oil herself. They put brakes on the car together. Fox encouraged her to go to college, and she would graduate with a nursing degree and no student loans.

He relished time with Mary and Terri, rarely discussing his job. "His family came first," Mary recalled. "He didn't bring work home."

Sunday was family day. "Don't ever think that you're going to go do something with your friends or anything," Terri recalled. Maybe they'd go to a state park or drive south to Gatlinburg, Tenn., for breakfast. Travel was impulsive, and the specifics weren't especially important.

"If I needed a new pair of shoes, most girls would go out with their moms or go out by themselves. All three of us went," Terri said, laughing. "Everybody thought we were strange, but we were a very, very close family."

Greater financial security had its price. Aside from Sundays, Fox rarely got to spend time with his family. Though he avoided discussing the hazards of his job, they often occupied Mary's thoughts. "When somebody calls your house in the middle of the night when your dad is at work, it sends a shiver up your spine until you realized it was a wrong number or something," Terri recalled.

By the 1980s, subtle but troubling signs began to appear. Fox grew tired more easily, and his breathing became labored. He kept a spit cup in his truck for the black phlegm he coughed up. "If he'd blow his nose," Mary recalled, "it would be black."

#### Pressing for answers

In the years leading up to Fox's first claim, glimpses of Jackson Kelly's tactics began to surface. That was, in large part, because of John Cline, a soft-spoken but tenacious man who would eventually become Fox's lawyer.



John Cline, who would eventually earn a law degree in 2002 and begin representing Gary Fox in 2007, came to southern West Virginia in 1968 as part of the program Volunteers in Service to America. For much of the next two decades, he built homes primarily for poor people who qualified for a government low-interest loan program (image at right, standing far left). In 1982, he went to work for a clinic that provided miners health care and advice on filing benefits claims (image at left).  
(Courtesy of John Cline)

A native of East Aurora, N.Y., a small town near Buffalo, Cline came to southern West Virginia in 1968 at 22 to work for Volunteers in Service to America, combating poverty in the coalfields. Also a carpenter and electrician, he spent most of the next two decades as a contractor building homes mainly for poor

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people who qualified for a government low-interest loan program.

In 1987, he joined the New River Health Association in Scarbro, W. Va., one of a group of nonprofit clinics that provide miners health care and advice on filing a claim. By the early 1990s, he was taking cases on his own as a lay representative, helping miners who couldn't find a lawyer navigate the system's complexities.

Cline entered the world of federal black lung benefits at a time when many who traditionally had helped miners were getting out. Changes to the law in 1981 had made winning benefits much more difficult. The influence of the United Mine Workers union was waning.

One of the peculiarities of the federal black lung system is the virtual nonexistence of the discovery process — both sides exchanging evidence they develop. Documents that would be disclosed routinely in civil court — reports prepared by experts or information on financial ties between a defendant and its witnesses, for example — are not commonly requested in black lung cases. Even when they are, a judge may opt not to compel disclosure.

Cline soon found himself in the middle of the nascent fight over what information had to be turned over. In 1995, he became the lay representative for Calvin Cline, a retired miner who was no relation to John. Calvin had worked 30 years underground, sometimes spending hours on his stomach clawing out coal in openings less than three feet high. By 1979, he could no longer keep up, he could barely breathe. When John took over his case, Calvin had been fighting for 15 years and had just suffered his second loss to Westmoreland Coal Co., which had hired Jackson Kelly. A Westmoreland spokesman declined to comment on particular cases or the benefits system generally.

John asked the court to force the firm to turn over any evidence it had withheld previously. The request lacked the polish of a seasoned lawyer, but it revealed a street-smart skepticism. In an attached affidavit, he said he'd almost never seen a case in which Jackson Kelly didn't submit X-ray readings by Dr. Jerome Wiot, a radiologist at the University of Cincinnati who had helped establish the criteria for identifying black lung on films and was a favorite of the firm because, in judges' eyes, his opinion often trumped all others. Despite his revered status, he had a narrow view of what black lung looked like on film, setting the bar for diagnosis very high and reliably benefiting coal-company defendants.

In Calvin's case, Jackson Kelly had submitted numerous X-ray readings, but none from Wiot.

Jackson Kelly responded with indignation, but not explicit denial. "There is absolutely no proof that the Employer consulted with [Wiot] in this case," lawyer Ann Rembrandt wrote in a response brief.

When the case went to the highest appeals court in the administrative system, the Benefits Review Board, Cline felt out of his league as a non-lawyer and enlisted the aid of a kindred spirit and fellow New York native, attorney Robert Cohen.

#### Withheld evidence

By Chris Hamby and Chris Zubak-Skees

October 29, 2013

The prominent black lung defense firm Jackson Kelly PLLC has a record of withholding key evidence, the Center for Public Integrity found as part of the yearlong investigation "[Breathless and Burdened](#)." Here are five examples from confidential case files obtained by the Center. Each stack of paper represents a miner's file, with the earliest filings and evidence at the bottom. The red paper shows when in the progression of the case a key piece of evidence was generated. These reports were not disclosed until months or years later, and, in some cases, they showed that a miner's previous defeat had rested on incomplete or misleading evidence.

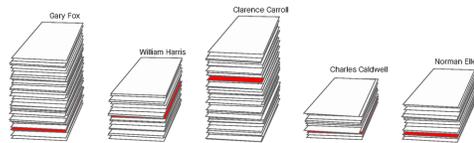


John Cline outside his home in Piney View, W.Va., which also serves as his law office.  
(P. Brian Ferguson/Center for Public Integrity)



Calvin Cline, center with tinted glasses, at a Congressional hearing alongside a fellow miner.  
(Courtesy of John Cline)

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Years earlier, Cohen had begun unraveling Jackson Kelly's strategy. Of the formal written questions Jackson Kelly was serving on his clients, one stood out: *Do you have any medical evidence or expert reports that you haven't already submitted?* When he asked the same question, the firm refused to answer. He'd touched off a fight that continues today.

Though Jackson Kelly's argument has evolved somewhat over the years, it has been essentially the same since at least 1990: Any doctor's report that the firm chose not to submit was "attorney work product" — protected from discovery under a privilege meant to shield lawyers from having to disclose their personal impressions and informal communications with potential witnesses while preparing a case. The firm filed briefs outlining this argument in virtually every case reviewed in detail by the Center.

To Cohen and Cline, this argument seemed plainly wrong. The documents they wanted were not lawyers' notes and correspondence with consultants, but formal reports written by doctors the firm had retained. They were no different than the reports that did end up in evidence, it seemed to them; the firm just didn't like what these reports said.

Calvin's case provided an opportunity for the review board to address the dispute. Labor Department lawyers filed a brief siding with Cohen, writing that the firm "has the obligation to disclose all evidence developed, whether favorable or unfavorable."

In a [landmark decision](#) in October 1997, the review board agreed for the most part. The board concluded that a miner could obtain any withheld reports by meeting a series of requirements — essentially that the evidence be vital to the case and unobtainable by other means. But this left the decision of whether a miner had met the requirements up to individual judges, who would arrive at differing conclusions in the years that followed. Jackson Kelly has tweaked its arguments, and it continues to fight disclosure today.

In Calvin's case, Jackson Kelly had to turn over any evidence it had withheld, and John's hunch proved correct. Not only had the firm consulted Wiot, but he had had written [reports](#) interpreting numerous X-rays and a CT scan as consistent with complicated black lung. In 2008, Jackson Kelly would abandon its appeals. After 28 years, Calvin had his benefits. Two years later, he died.

Just months after the board's decision, Cline made another discovery. By April 1998, retired miner William Harris had been trying to win benefits for 18 years. His most recent employer, Westmoreland Coal Co., had hired Jackson Kelly. When Cline began representing him in September 1997, an item's conspicuous absence jumped out.

In Harris' previous claim, some doctors had read X-rays as complicated black lung; others hadn't. Wiot, who has since died, had testified that it was a "judgment call" whether the disease had reached the complicated stage. He believed it hadn't, but a CT scan should remove any question, he'd said. CT scans

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are considered more accurate than X-rays because they allow doctors to see finer detail.

Harris underwent the scan, and the judge credited the negative reading of Jackson Kelly's expert, a radiologist at Johns Hopkins, over the positive reading of Harris' expert. Harris lost.

*Why hadn't Jackson Kelly gotten Wiot to read the CT scan?* Cline wondered. After all, they'd stressed Wiot's interpretation of the X-rays, and the judge had found that he "may be the preeminent radiologist in the country" when it came to identifying black lung.

For seven months, Cline pushed for Jackson Kelly to turn over any reports it had on Harris. Finally, he decided on an end-run. He faxed a request directly to Wiot's secretary asking for the doctor's interpretation of Harris' CT scan, guessing that one existed. He soon got the response: a **private** finding the scan consistent with complicated black lung. Jackson Kelly had, in essence, stressed the importance of Wiot's X-ray readings when they supported the firm's case, then withheld his opinion of the more useful test when it didn't.

The judge ordered Jackson Kelly to turn over any other documents it had on Harris. Instead, the firm conceded, agreeing to pay Harris benefits. Harris took the deal, ending his claim without finding out what else Jackson Kelly may have had in its files.

Cline and Cohen had uncovered some troubling signs, but just what they meant — and what to do about them — was not yet clear.

## II. Denial

### 'All of the evidence'

To someone unacquainted with the federal black lung system, the claim that Gary Fox filed in May 1999 might have seemed fairly simple. He had more than 25 years of heavy exposure to disease-causing dust, virtually no history of smoking cigarettes and many of the typical signs of black lung. A doctor certified by the Labor Department had performed breathing tests and taken X-rays, concluding that he had the complicated form of the disease.

But federal black lung cases are almost never simple. Lawyers like those at Jackson Kelly thrive on medical uncertainty and alternative explanations for the miner's apparent illness. A lone piece of evidence may provide the fuel, gaining strength in the self-reinforcing spread from one doctor's opinion to the next.

Thus it was with the pieces of lung tissue that had been surgically removed from Fox in 1998. Pathology is considered the best way to diagnose black lung, but it's not available in many cases. In Fox's case, Jackson Kelly took what could have been a damning piece of evidence and turned it into the centerpiece of its case.

There is no evidence that Fox grasped the significance of the pathology or connected the surgical removal of the mass to black lung. During his testimony in September 2000, Fox made only a passing reference to the surgery, which he told the judge had been to remove "a tumor." Even recently, when asked about it, Mary said, "All I know is it wasn't cancer."

The **report** from the hospital pathologist, who is now dead, mentions the surgery's purpose — to rule out cancer — and his diagnosis of "inflammatory pseudotumor," essentially a mass that looked like a tumor but probably was caused by some unknown inflammatory disease. The pathologist didn't mention the possibility of black lung, or that he had any information about Gary's job or risk for the disease.

Jackson Kelly clearly grasped the importance of the pathology. Unknown to Fox, the firm sent the slides of lung tissue to Drs. Richard Naeye and Raphael Caffrey, both of whom had decades of experience identifying black lung and were among a small group of pathologists that Jackson Kelly used frequently.

This time, however, Naeye **found** that the mass appeared to be attributable, at least in part, to the dust Fox had breathed for decades. Caffrey was even clearer, **concluding**, "this lesion most likely represents complicated pneumoconiosis."

Yet when the firm submitted evidence to its chosen pulmonologists — doctors who render a diagnosis incorporating the evidence provided to them — the reports by Naeye and Caffrey were nowhere to be found. Instead, Jackson Kelly allowed its group of four pulmonologists to believe that no interpretation other than the hospital pathologist's existed.

Dr. Gregory Fino, under this impression, began his report, "I have reviewed all of the medical records that you have been able to develop regarding the

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above-referenced Black Lung claimant."

In depositions, the firm's lawyers deftly guided its experts, asking variants of the same question: Does the pathology report call into doubt a diagnosis of complicated black lung? The question more or less dictated the answer: Yes.

Pulmonologist James Castle acknowledged that he had originally diagnosed black lung, but changed his mind because of the hospital pathologist's report.

Wielding the pathology as a cudgel to deal the final blow, Douglas Smoot, a senior attorney in the firm's black lung unit, sought to discredit the doctor who had evaluated Fox for the Labor Department and had based his diagnosis solely on his own examination.

"Do you think that [the Labor Department-certified doctor] would have been aided by having all of the biopsy medical evidence at his hand when he reviewed this case?" Smoot asked Castle during a deposition.

"I think that he would have," Castle answered, unaware of the bitter irony of the exchange, "and I would certainly hope so, because all of the evidence, as I've outlined, clearly indicates that this is not complicated disease."

Administrative Law Judge Miller made it clear that the pathology report was vital in his decision to deny Fox's claim. The report, he wrote, "proved the large mass in the miner's right lung to be a pseudotumor and neither cancer nor complicated pneumoconiosis."

In a recent interview, Miller said knowing of the reports by Naeye and Caffrey would have changed the case dramatically: "I frankly think that, when you get to that point and you are offering evidence of a certain kind and you know material is there which clearly makes that evidence false or incomplete — you just don't do that, that's wicked," he said.

Without a lawyer, Fox didn't even try to appeal. Meanwhile, Mary was battling her own health problems: "I had to have insurance at the time," Mary recalled. "And that's really all he knew to do, was mining." He went back to work.

**A pattern emerges, out of sight**

Case by case, the evidence of a pattern in Jackson Kelly's conduct grew. It remained out of sight, amassing in confidential files.

For example, there was Clarence Carroll, who, during a battle with Jackson Kelly that lasted more than two decades, went from a 195-pound retired miner who enjoyed walks and line-dancing with his wife to a 112-pound skeleton tethered to an oxygen tank. Jackson Kelly, it turned out, had withheld X-ray readings by doctors, again including Wiot, who had found evidence of complicated disease.

But it was the firm's handling of another potentially problematic opinion in Carroll's case against his employer, Westmoreland Coal Co., that revealed particular finesse. Reading a series of X-rays is regarded as more accurate than reading a single X-ray because it allows the doctor to view the progression of the disease. Jackson Kelly made this exact argument in Carroll's case when it submitted readings by some of its doctors.

But when one of its radiologists interpreted a series as showing complicated disease, the firm withheld the report. Instead, it went back to the same



Clarence and Dolores Carroll in November 2010. "Just looking at these pictures, I cry," Dolores said recently. "It's like looking at a ghost."  
(Courtesy of Dolores Carroll)

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doctor two years later and showed him only the final film in the series. This time, he [said](#) the disease had not yet reached the complicated stage. Jackson Kelly won the case.

In other words, the firm had withheld a report that, according to its own argument, was more accurate and instead submitted a less accurate report more favorable to its case. After Cline filed a motion asking the judge to order Jackson Kelly to turn over any other evidence it might have, the firm conceded the case. Carroll died within three years.

There was Norman Eller, a retired miner and deacon at the Baptist church near his home in Slab Fork, W.Va., who eventually lost the breath to sing in the gospel choir or mow the lawn during his decade-long fight with Jackson Kelly, which had been hired by his employer, Elk Run Coal Co. A CT scan proved vital in his case.



Clarence and Dolores Carroll in Halloween in 2009 after Clarence fell and broke his pelvic bone.  
(Courtesy of Dolores Carroll)



The morning of a deposition by Jackson Kelly's chosen pulmonologist, the firm gave the doctor a [report](#) interpreting the scan. It referenced the scan's "limited" nature but said there was no evidence of black lung. During the deposition, Jackson Kelly attorney Mary Rich Maloy trained the doctor's attention on the report, and he incorporated it into his opinion, which the judge credited in denying Eller's claim. Jackson Kelly argued in its closing brief that the CT scan, also interpreted by another doctor as "incomplete" but negative for black lung, showed that Eller didn't have the disease.

What Jackson Kelly didn't disclose was a third reading of the CT scan — this one by Wiot — that [stated explicitly](#) just how "limited" the scan was. Because key portions weren't there, Wiot wrote, "evaluation for the presence or absence of pneumoconiosis cannot be made." In other words, according to Wiot, the scan was useless — not the strong evidence for the lack of disease that Jackson Kelly had claimed.

The firm eventually would drop its appeals in May 2010. Eller died eight months later.

And there were the widows.



Norman Eller  
(Courtesy of the Eller family)

In two cases examined by the Center, Jackson Kelly waited until a miner who was receiving benefits died, then not only fought his widow's claim as a surviving beneficiary but also filed to reopen the miner's claim, arguing that he never had black lung or wasn't disabled by it. In other instances, the firm made similar arguments but did not seek to invalidate the earlier victory.

In one case in which Jackson Kelly did try to turn a dead miner's previous win into a loss, the review board [ruled](#) that the firm's attempts to undercut the widow's claim by challenging anew the miner's earlier case were an attempt to "circumvent the law." The U.S. Court of Appeals for the Fourth Circuit [called](#) the firm's motives in doing so "putently improper." Jackson Kelly defended its actions as "proper" in a court filing.

In two other cases, Jackson Kelly fought the widow for years before conceding the case after a judge ordered the firm to turn over any evidence it was withholding.

"You think, 'They can't do that,'" said William DeShazo, the son of one of the widows. "But they did do that. ... So they start throwing the paperwork at my mom, and I think they hope for one of two things: You run out of resources, or you can't find a lawyer to help you." Cline eventually agreed to represent DeShazo's mother, LaVerne, who has undergone a series of strokes since her husband's death.

Jackson Kelly's approach — folding rather than turning over any undisclosed evidence it had — was eerily reminiscent of the end to Harris' case five years earlier, and, since then, Cline had seen the firm's strategy play out numerous times. Jackson Kelly would shop for evidence, he argued, then withhold unfavorable opinions, knowing there was little chance they would be discovered. In the rare cases in which the firm had been ordered to turn over withheld

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documents, it sometimes had conceded. This occurred in six cases reviewed in detail by the Center.

In theory, these cases are wins for the miners, but the strategy also benefits Jackson Kelly. The firm doesn't have to reveal documents that could show it chose to fight despite having strong evidence the miner had black lung. The tactic also prevents the miner from uncovering reports that might show he was diagnosed with the disease at an earlier date, entitling him to back pay for accumulated benefits. And it allows the firm to argue in a widow's claim that the miner never had black lung.

"My concern," a judge wrote in a 2005 email obtained by the Center, "is ... that for an attorney to circumvent an inquiry into his alleged misconduct, all that he has to do is concede liability."

Meanwhile, Jackson Kelly showed a willingness to defy court orders and to attack judges whose rulings it didn't like. In a pair of cases before Administrative Law Judge Fletcher Campbell in 2004, the firm refused to answer questions about its financial relationships with doctors it enlisted.

"This honorable tribunal does not have the authority to issue sanctions for failure to comply with an order compelling discovery," attorney Katly Snyder pointed out in one case.

In one case, Jackson Kelly argued that Campbell's actions, including an order granting a discovery motion, amounted to bias. When a judge in another case raised the possibility of the miner's lawyer filing a discovery request, Jackson Kelly demanded he recuse himself. He did, and the case was reassigned to a different judge.

Campbell, now retired, said the information being requested of Jackson Kelly was perfectly reasonable.

"In any federal district court, this would be a no-brainer," he said. In the federal black lung system, however, things weren't so clear. In a number of cases reviewed by the Center, judges denied the requests of miners' lawyers for withheld documents or information.

In some cases, miners' lawyers asked judges to reprimand or penalize Jackson Kelly. But even as the firm's defiance of court orders and withholding of evidence recurred, it faced few repercussions, and there was no general recognition among judges that individual instances were part of a larger litigation strategy.

#### 'Gary, you need to get away'

The complicated form of black lung that many doctors diagnosed in Gary Fox has another, more descriptive name: progressive massive fibrosis. The small scars laden with coal dust that characterize the simpler form coalesce into large masses. By this point, the march of the disease cannot be stopped. The scarring can spread, turning the lungs black and shriveled. It is irreversible, incurable and fatal.



Gary and Mary Fox  
(Courtesy of Terri Smith)

When a miner shows signs of the disease, it is vital that he get out of the dusty atmosphere. In 2000, Fox transferred to a mining job that was not

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underground, but, even above ground, the dust was inescapable. After losing his claim, he worked five more years at the mine as his health worsened.

Mary was struggling with her own illness, and Gary tried to support her. "If I got bad news and cried, he'd crawl into bed and cry with me," Mary recalled.

She could see him withering. No longer could he cut the grass or climb steps. He couldn't walk far before his breathing became labored and he had to stop.

Co-workers saw it, too. One, who asked not to be named because he is pursuing his own claim and fears retaliation, recalled coming upon Fox in the bathroom in the throes of a coughing fit day after day.

"Gary, you need to get away," he told Fox after one spell. "The dust is killing you."

"Yeah," Fox replied. "I know."

### III. Decision

#### A familiar pattern — and an opportunity

Gary Fox and John Cline met in January 2007. Two months earlier, Fox finally had decided he couldn't go on working; he retired and filed a second claim for benefits. The doctor who examined him for the Labor Department knew Cline and had suggested Fox contact him.

Cline found Fox quiet and thoughtful. Though he was only 56 years old, Fox clearly was struggling to breathe just from a couple of hours of conversation. In the past two years, he'd lost about 40 pounds. The Labor Department-certified doctor again had diagnosed complicated black lung, and this time he'd noted a severe decline in Fox's lung function.

The case instantly aroused Cline's suspicions. He had finished law school just five years earlier, but he'd seen Jackson Kelly in operation for much longer. To him, the lack of pathological evidence generated by the firm was a red flag. He told Fox he thought it was likely the firm had reports about his lung tissue that it had never revealed. A week later, the two talked again. Cline took the case.



John Cline at his home office in Piney View, W.Va.  
(F. Brian Ferguson/Center for Public Integrity)

Within days, he served Jackson Kelly with formal written questions, asking for any evidence not turned over. When Jackson Kelly attorney Ann Rembrandt [refused](#), Cline filed a discovery motion with the judge, Thomas Durke. Rembrandt gave the firm's standard response, fine-tuned over the years, claiming that any reports it chose not to submit were privileged.

Durke [sided](#) with Cline.

Jackson Kelly continued to fight, filing motions asking Durke to reconsider and asking the review board to intervene. The board declined, and Judge Durke again ordered Jackson Kelly to turn over evidence by August 4, 2008.

The deadline arrived, but the firm didn't produce any documents. Instead, it conceded the case.

By now, Cline knew the strategy well. In past miners' claims, he'd tried to keep the case alive, to force Jackson Kelly to turn over the evidence it had withheld, to expose just what information the firm had and when it had it. He hadn't been successful.

There was reason to believe this time might be different. But first, he and Fox had an unenviable choice to make.

#### A legal tipping point

In the years leading up to Fox's retirement and second claim, there were signs that perceptions might be shifting among the administrative law judges who hear black lung cases. That was, in large part, because of Elmer Daugherty.



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A retired miner who had worked more than 30 years underground, most of that time for Westmoreland Coal Co., Daugherty had tried multiple times to win benefits, losing each time. When he filed again in 2000, he was 75, with an 8th-grade education and no lawyer to represent him.

At Jackson Kelly's request, he underwent an examination by Dr. George Zaldivar. The report that Zaldivar gave the firm included a narrative, an X-ray reading and the results of lung-function tests. The narrative portion was a potential problem for the firm; it [diagnosed](#) Daugherty with complicated black lung. Because the report was from an exam, not a re-reading of existing evidence, Daugherty would know it existed; the firm couldn't withhold the entire thing. Instead, attorney Smoot removed the narrative portion and submitted [the rest](#) — a pile of forms and graphs that mean little to someone without the training to interpret them.



Retired miner Elmer Daugherty's case led to disciplinary proceedings against a Jackson Kelly attorney. (Courtesy of Hugh Daugherty)



In 2004, however, attorney Cohen agreed to represent Daugherty, and he uncovered what Smoot had done. When Cohen raised the issue at a hearing, Jackson Kelly lawyer Dorothea Clark began to defend the firm's actions.

Administrative Law Judge Michael Lesniak cut her off. "[T]he point is, that you withheld the report, Ms. Clark," he said. "And I could only assume that you didn't like what it had to say, so instead of paying the claim, you withheld the report. ... These are the sort of things we have to stop. And you can't win at any cost."



Elmer Daugherty, a miner for more than 30 years, appears at center with his daughter Edith, left, and son Hugh, right. (Courtesy of Hugh Daugherty)

In the following months, Jackson Kelly continued to insist it had done nothing wrong. The head of the black lung unit, Bill Mattingly, argued, for example, that the firm hadn't actually taken apart the report because, although the narrative and technical findings had come in the same envelope, they weren't "attached."

Cohen contended Jackson Kelly's actions were part of a long-standing pattern. "[C]laimant suspects that this conduct has been applied on a widespread basis and may be responsible for the loss of black lung benefits by hundreds, if not thousands, of other claimants during the 30 year period that the Department of Labor has had jurisdiction to adjudicate cases under the Black Lung Benefits Act," he wrote in a December 2004 court filing.

Lesniak ordered Jackson Kelly to turn over any other evidence it had. The firm refused. He [referred](#) the case to a federal district court, which has contempt powers. That court [concluded](#) it didn't have jurisdiction but made it clear that it "in no way approves the conduct of Jackson Kelly lawyers." It referred the case to the West Virginia Office of Disciplinary Counsel.

The firm mounted a vigorous defense, paying a former administrative law judge to testify that there was nothing wrong with its actions. Ultimately, Smoot's license was suspended for one year. The West Virginia Supreme Court of Appeals [called](#) his actions "deceitful, dishonest" and "an affront to justice that simply cannot be tolerated." The court also found that Smoot "lacks remorse and has refused to acknowledge the wrongful nature of his conduct."

Three other Jackson Kelly lawyers — Mattingly, Clark and Stryder — were investigated but not sanctioned. Nonetheless, a panel of the Lawyer Disciplinary Board [said](#) it was "deeply troubled by the act of disassembling Dr. Zaldivar's report," which the three had defended but apparently had not participated in, and warned them, "[V]iolations of discovery orders in the future will evidence a pattern of behavior" inconsistent with good faith.



The case created a stir within the Office of Administrative Law Judges. The judge in charge of the black lung program sent an email praising Lesniak for "protecting the ethics and integrity of our

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court process." Another judge credited Lesniak with exposing "the unethical and unconscionable conduct of an attorney for Jackson & Kelly."

The Daugherty case was not isolated. Jackson Kelly had done essentially the same thing to miner Charles Caldwell almost a decade earlier, documents obtained by the Center show. Zaldivar had examined Caldwell and written a [report](#) diagnosing complicated black lung. Another lawyer at the firm appears to have done the same thing Smoot would do years later — removed the narrative and submitted [the rest](#).

After the Daugherty case, the tone appeared to have shifted with some judges. Lesniak's words in a 2005 order evidenced growing concern: "I assume, then, I can expect more of the same from Jackson Kelly P.L.L.C. ... I find [the firm's] defense of this practice ... to be ludicrous."



#### Culmination of longstanding battles

The progression of complicated black lung can be rapid and shocking. Gary Fox's decline began in 2008 as he and Cline were in the midst of their fight against Jackson Kelly. He and Mary spent most of their time in Pittsburgh, hoping the University of Pittsburgh Medical Center could find a suitable candidate for a lung transplant.

Terri worked as a nurse in Morgantown, W.Va., and called her parents every day. "He couldn't even carry on a conversation on the telephone," she said of her father. "He would get winded."

One day, a fire alarm went off at the house where he and Mary were staying in Pittsburgh. "He couldn't get down the steps. He had to slide down on his butt," Mary recalled. "He could not walk down."

By Christmas, Fox was on oxygen full-time, gaunt and pale. He was frequently hospitalized with respiratory infections he couldn't shake. Nurses told Mary he wouldn't sleep when he was alone in the intensive care unit. "He was scared to go to sleep," she recalled. "He'd jerk and wake up and see if I was still there. He thought that he would die in his sleep."

He managed to stay in contact with Cline. When Jackson Kelly conceded, the two had a decision to make: Would they take the assured benefits or push for Jackson Kelly to reveal any evidence it had?

Other miners had reached this point and settled, exhausted from years of fighting. In some cases, judges had considered the claim finished once the firm folded, denying requests to keep the case alive.

“

***"We wanted to press on so they wouldn't do it no more. ... If it could help somebody else out, we needed to press on."***

— MARY FOX, RECALLING HER AND GARY'S DECISION TO PUSH FOR EVIDENCE FROM JACKSON KELLY

There were risks to continuing to push. Though Cline had strong suspicions, there were no guarantees Jackson Kelly actually had withheld evidence, let alone that it would be helpful. Perhaps the firm was fighting disclosure not because there was anything damning in Fox's case but because it wanted to preserve the right to withhold evidence in other cases. Suppose the judge ordered disclosure and there was nothing useful. Fox could lose.

Even assuming Jackson Kelly had withheld pathology reports in Fox's earlier claim, the only way to reopen that case and seek benefits dating back to the time of those readings would be to accuse the firm of "fraud on the court." This was an almost impossibly high bar to clear. Even using perjured testimony or fabricated documents wouldn't qualify. Cline would have to prove that Jackson Kelly had carried out an elaborate scheme that undermined the integrity of the system. And he, one man practicing out of his home, would have to do it against a large, savvy law firm.

Coal industry's go-to law firm withheld evidence of black lung, at expen... <https://publicintegrity.org/environment/coal-industry-go-to-law-firm-w...>

"It's a big-deal allegation," Cline said recently. "And if I was wrong, then I've gone out on a limb ... I lost a fair number of nights' sleep."

He discussed the options with Fox, leaving the choice to him. Gary and Mary talked it over and made a decision. "We wanted to press on so they wouldn't do it no more," Mary said recently. "We knew what we had gone through and what we were going through, and he just thought, if it could help somebody else out, we needed to press on."

For weeks, Cline traded blows with Jackson Kelly. Eventually, Burke ordered the firm to turn over any evidence it had withheld. On the day the judge had set as a deadline, attorney Ann Rembrandt faxed a set of documents to Cline and Burke. Included were the pathology reports of Drs. Naeye and Coffey, emerging from Jackson Kelly's files after eight years.

Now on the defensive, Rembrandt argued that Jackson Kelly had done nothing wrong. The firm had no legal duty to disclose the reports to Fox, the judge or its own experts, she wrote in a brief. The firm's lawyers didn't know which doctors were right, just that they had different opinions, she said. Jackson Kelly, she wrote, "was free to make the litigation decision to use whichever opinion best supported its defense of the case."

On Feb. 9, 2009, Burke issued a **decision** that had been decades in the making.

"Despite knowledge of the role pathology evidence played in the case, Employer continued to conceal the more probative reports of Drs. Coffey and Naeye while emphasizing, and encouraging reliance upon, the report of [the hospital pathologist]," he wrote. "When Claimant's counsel attempted to bring evidence of Employer's conduct to light, Employer engaged in a course of conduct designed to conceal its actions: first denying the presence of the reports, then conceding liability to prevent their disclosure."

Burke agreed with what Cline had been arguing for years. "Surely, Employer must recognize a duty to provide accurate evidence to its expert witnesses," he wrote. "An expert's report cannot be considered to be solely a reflection of the evidence selected and provided by a party. If such were the case, an expert medical opinion could never be accepted as a reliable diagnosis."

The opinion was a repudiation of Jackson Kelly's aggressive approach to what is essentially a workers' compensation program, not high-stakes civil litigation with multi-million-dollar verdicts. "Employer's 'zealous' representation strategy instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung disease," Burke wrote.

Overall, he determined, Jackson Kelly's behavior amounted to "fraud on the court." Burke reopened Fox's previous claim and awarded benefits dating to 1997. As it turned out, the firm also had withheld an X-ray reading by one of its radiologists finding complicated black lung on an X-ray taken the year before Fox's biopsy, justifying an even earlier entitlement date in Burke's view. For the moment, it was an unprecedented win for Fox and Cline.

Today, that victory is uncertain. Jackson Kelly appealed, and the review board ruled in a split decision that the firm's actions had not reached the extraordinarily high level of "fraud on the court." The case is now before the U.S. Court of Appeals for the Fourth Circuit. Jackson Kelly contends it had no legal duty to disclose all of the evidence it developed, while Cline argues that the firm nonetheless had an ethical duty not to mislead Fox, the court and its own experts. The appeals court's decision could have profound implications not just for the Fox family, Cline and Jackson Kelly, but for generations of miners.

#### A last fight for breath

Less than two months after Burke's decision, Fox was admitted to the University of Pittsburgh Medical Center with a cough, breathlessness and chest pain. He had severe pneumonia, and the struggle to breathe strained his heart, which began to fail.

Easter Sunday came. Terri cooked a big meal and took it to the hospital, but Gary could barely eat. Doctors pulled Mary and Terri aside and asked, "What do you want done for him?"

Terri thought, *Why do I want him to sit here and suffocate to death?* They told the doctors to do all they could. "I was in complete denial," Terri recalled. "I really thought that he was going to get better and he was going to get the transplant and everything was going to be OK."

On Tuesday, April 14, 2009, Mary had an appointment with an eye doctor. "Just go," Terri told her. "He's going to be fine." Terri's husband, a cardiologist, came to stay with her and Gary.

Coal industry's go-to law firm withheld evidence of black lung, at expen... <https://publicintegrity.org/environment/coal-industry-go-to-law-firm-w...>

At 2 p.m., his blood pressure dropped suddenly. Monitors sounded, and doctors ran into the room. At first, he responded to drugs, then his heart rate spiked.

When Mary returned, staff told her she couldn't go to Gary's room. She ignored them. Gary had needles in his chest and a tube in his throat. Doctors beat his chest violently in a final attempt to bring him back.

"They worked on him for a little over an hour," Terri said. "I was afraid of [my mom] seeing all that because it's pretty traumatizing. It's something that I've done several times, but when you see your own parent there lifeless and not responding at all ... I had to pull my mom back and tell her that it had been over an hour and, even if something did happen, that he wasn't ever going to be the same person."

At 3:34 p.m., the doctors stopped.

"I was there through the whole thing — them working on him and him dying right in front of me," Terri recalled. "I still have nightmares."

Now she thinks of all the things her father never got to see. She married in September 2009, five months after his death, walking down the aisle alone. Gary had desperately wanted a grandchild. After he died, Terri gave birth to a boy, Luke. Friends comment on the dimple that appears on Luke's left cheek when he smiles; it reminds them of Gary's.

The family shared a love of West Virginia University Mountaineers football. Terri went to every home game, and Gary went when he wasn't working. They'd park a few blocks from the stadium and walk. For the last few years of Gary's life, Terri noticed he'd have to stop and catch his breath. She started dropping him off next to the stadium.

In September 2009, Terri went to a game for the first time without her father, who had been buried with his WVU hat a few months earlier. The Mountaineers won 33-20. Terri just cried.

After his death, doctors opined that Gary's breathing problems caused his heart to fail, killing him. When a pathologist performed the autopsy, he saw extensive scarring and dark masses in his lungs.

It was undoubtedly complicated black lung. It always had been.



Gary Fox's grave in Beckley, W.Va.  
(ABC News)

Johns Hopkins suspends black lung program after Center-ABC investig... <https://publicintegrity.org/environment/johns-hopkins-suspends-black-l->



## ENVIRONMENT

### Johns Hopkins suspends black lung program after Center-ABC investigation



by Chris Hamby, Brian Ross and Matthew Meak  
November 1, 2013

Reading Time: 2 minutes

Johns Hopkins Medicine has suspended its black lung program pending a review in response to a Center for Public Integrity-ABC News investigation revealing how medical opinions from doctors at the prestigious hospital have **helped coal companies thwart efforts by alling mine workers** to receive disability benefits.

"Following the news report we are initiating a review of the [black lung X-ray reading] service," said a statement issued late Friday by Johns Hopkins Medicine. "Until the review is completed, we are suspending the program."

Hopkins' decision came as United States senators from coal country announced they have begun working on new legislation to address "troubling concerns" raised in this week's reports.

"This new report raises a number of troubling concerns," said a statement from U.S. Sen. Robert P. Casey, D-Pa. Friday. "It is imperative that miners receive fair treatment and are not victimized at any point in the system. I am working closely with Senator [Jay] Rockefeller to develop new legislation to address the problem."

Rockefeller called the treatment of coal miners a "national disgrace" in an interview with ABC News.

At the center of the program is the work performed by Dr. Paul Wheeler, who heads a unit at Johns Hopkins Hospital where radiologists read X-rays of coal miners seeking black lung benefits. **Wheeler found not a single case of severe black lung in the more than 1,500 cases** decided since 2000 in which he offered an opinion, a review by the Center and ABC News found. In recent court testimony, Wheeler said the last time he recalled finding a case of severe black lung — a finding that would automatically qualify a miner for benefits under a special federal program — was in "the 1970's or the early 80's."

Officials with the United Mine Workers, the labor union that represents coal miners, expressed outrage at the Center-ABC News report and called on the federal agency that oversees the nationwide network of doctors who read X-rays in black lung cases to prohibit Wheeler from further involvement in black lung cases.

"Whatever penalties or punitive actions that can be taken with respect to Dr. Wheeler should be," said Phil Smith, the spokesman for the union. "But whatever they are, they will pale in comparison to the pain and suffering he has caused thousands of afflicted miners. There is no penalty which will make up for that."

In an interview for the news reports, Wheeler stood by his opinions. "I've always staked out the high ground," Wheeler said.

Earlier Friday, Johns Hopkins Medicine posted a statement on its website saying the hospital was "carefully reviewing" the media report and the top-ranked hospital's black lung unit.

The news report triggered a vocal response from lawmakers and advocates for miners, who expressed outrage at the challenges the coal workers were confronting when trying to obtain the monthly disability payments from their employers.

"This scathing report lays bare for the public something miners and their families in the coal fields have known for decades," said Richard Trumka, president

Johns Hopkins suspends black lung program after Center-ABC investig... [https://publicintegrity.org/environment/johns-hopkins-suspends-black-l...](https://publicintegrity.org/environment/johns-hopkins-suspends-black-lung-program/)

of the AFL-CIO, and a former president of the union's affiliate, the United Mine Workers. "Even with my years of experience in the mines and as a union leader, knowing full well that coal companies have been cheating miners since the day coal was hand loaded and weighed ... I was sickened and angered" by the report.

"You don't have to be a doctor at Johns Hopkins to know black lung disease when you see it," said Trunka, who noted that his father died from the disease.

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## **Attachment 16**



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United States Government Accountability Office

Testimony

Before the Committee on Education and  
Labor, Subcommittee on Workforce  
Protections, House of Representatives

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For Release on Delivery  
Expected at 2:00 p.m. ET  
Thursday, December 2, 2021

## BLACK LUNG BENEFITS PROGRAM

### Continued Inaction on Coal Operator Self- Insurance Increases Financial Risk to Trust Fund

Statement of Thomas Costa, Director,  
Education, Workforce, and Income Security



## GAO@100 Highlights

Highlights of GAO-22-105546, a testimony before the Committee on Education and Labor, Subcommittee on Workforce Protections, House of Representatives

### Why GAO Did This Study

The Trust Fund, which pays benefits to coal miners disabled due to black lung, faces financial challenges. It has borrowed from the U.S. Treasury's general fund almost every year since 1979 to make needed expenditures. In February 2020, GAO found that DOL's limited oversight of coal mine operator insurance exposed the Trust Fund to additional financial risk.

This testimony is based on reports GAO issued in 2020 and 2018. GAO found in 2020 that in overseeing coal operator self-insurance DOL did not (1) estimate future benefit liability when setting the amount of collateral required to self-insure, (2) regularly review operators to assess whether the required amount of collateral should change, or (3) always take action to protect the Trust Fund by revoking an operator's ability to self-insure as appropriate.

To obtain updated information for this hearing statement, GAO interviewed DOL officials in November 2021 and reviewed agency documentation.

### What GAO Recommends

DOL agreed with the recommendations made in GAO's 2020 report that DOL should establish procedures for self-insurance renewals and coal operator appeals. Doing so could better position DOL to take action to protect the Trust Fund should an operator not submit its renewal application or comply with DOL's collateral requirements. In addition, appeals procedures could help ensure that DOL is able to revoke an operator's ability to self-insure, when warranted. Both recommendations remain open.

View GAO-22-105546. For more information, contact Thomas Costa at (202) 512-4769 or [costat@gao.gov](mailto:costat@gao.gov).

December 2, 2021

## BLACK LUNG BENEFITS PROGRAM

### Continued Inaction on Coal Operator Self-Insurance Increases Financial Risk to Trust Fund

#### What GAO Found

The Department of Labor (DOL) took initial steps to implement GAO's recommendations to improve its oversight of self-insured coal mine operators, but its reform effort was hindered by the COVID-19 pandemic and a review of the program by the current administration, according to DOL officials. Black lung benefits are generally paid by liable coal mine operators, and federal law generally requires coal mine operators to secure their black lung benefit liability. Operators are allowed to self-insure if they meet certain DOL conditions. The federal government's Black Lung Disability Trust Fund (Trust Fund) pays benefits when no responsible mine operator can be identified or the liable mine operator does not pay. This can happen, for example, when an operator goes bankrupt.

As GAO reported in 2020, the bankruptcies of some self-insured operators that occurred from 2014 through 2016 led to the transfer of \$865 million in estimated benefit responsibility to the Trust Fund, according to DOL. This occurs when the amount of collateral DOL requires from a self-insured coal operator does not fully cover the operator's benefit responsibility should the operator become insolvent. Since 2016, several other self-insured operators have also filed for bankruptcy, according to DOL.

In February 2020, DOL sent letters to 14 self-insured operators asking them to provide about \$251 million in total collateral. Half of the coal operators provided the collateral DOL requested and the other half appealed, according to DOL. DOL officials said their ability to resolve the appeals was hindered by the COVID-19 pandemic and they suspended reviews of coal operator appeals.

In December 2020, DOL issued a preliminary bulletin for coal operator self-insurance that described significant changes and included actions that would have addressed GAO's recommendations. For instance, DOL set a goal to resolve coal operator appeals within 90 days after receiving supporting documents or meeting with the operator to discuss their concerns.

However, in February 2021, DOL rescinded the preliminary bulletin due to a program review by the current administration, according to DOL officials. DOL officials said they have taken no further actions to resolve appeals or to collect any additional collateral or other information from self-insured operators. As a result, DOL has not obtained about \$186 million in requested collateral from self-insured operators that appealed DOL's requested collateral. In addition, one of these operators, Lighthouse Resources, filed for bankruptcy in December 2020; this could result in a transfer of about \$2.4 million in estimated benefit responsibility to the Trust Fund, according to DOL. In addition, two operators DOL said no longer met their requirements to self-insure almost two years ago remain self-insured.

In November 2021, DOL officials said the current administration's program review is complete, but could not describe any anticipated changes to coal operator self-insurance going forward. Given that the Trust Fund had to borrow about \$2.3 billion from the U.S. Treasury in fiscal year 2021 to make needed expenditures, we reiterate that DOL should take action to address our previous recommendations to help prevent additional benefit liabilities from transferring to the Trust Fund.

United States Government Accountability Office

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Chairwoman Adams, Ranking Member Keller, and Members of the Subcommittee:

Thank you for the opportunity to highlight GAO's prior work that describes the financial challenges facing the Black Lung Disability Trust Fund (Trust Fund). I will describe how the Department of Labor's (DOL) limited oversight of coal mine operator self-insurance has affected the Trust Fund, and I will provide an update on actions DOL has taken to implement our recommendations to improve oversight of coal operator self-insurance.<sup>1</sup>

The Black Lung Benefits Program provides medical and cash assistance to certain coal miners who are totally disabled due to pneumoconiosis, also known as black lung disease.<sup>2</sup> About 24,500 total beneficiaries (primary and dependents) were receiving black lung benefits during fiscal year 2021.<sup>3</sup> The number of beneficiaries has decreased over time as a result of declining coal mining employment and an aging beneficiary population, according to DOL officials. However, black lung beneficiaries could increase in the near term due to the increased occurrence of black lung disease in its most severe form, progressive massive fibrosis,

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<sup>1</sup>GAO, *Black Lung Benefits Program: Improved Oversight of Coal Mine Operator Insurance Is Needed*, GAO-20-21 (Washington, D.C., Feb. 21, 2020) and GAO, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351 (Washington, D.C., May 30, 2018).

<sup>2</sup>A miner's surviving dependents can also receive compensation. Black lung is caused by breathing coal mine dust, and the severity of the disease can range from mild—with no noticeable effects on breathing—to advanced disease, which could lead to respiratory failure and death, according to the Department of Health and Human Service's Centers for Disease Control, National Institute for Occupational Safety and Health.

<sup>3</sup>This number excludes black lung beneficiaries whose claims were filed on or before December 31, 1973, as these awards are generally funded from Treasury's general fund, and not the Trust Fund. It also excludes beneficiaries that only receive medical benefits.

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particularly among Appalachian coal miners, according to National Institute for Occupational Safety and Health (NIOSH) officials.<sup>4</sup>

Black lung benefits are generally to be paid by liable coal mine operators. However, the federal government's Trust Fund pays benefits in certain circumstances, including in cases where no responsible mine operator can be identified or when the liable mine operator did not pay.

This statement is based on prior work.<sup>5</sup> In producing our February 2020 report, we identified coal operators that filed for bankruptcy from 2014 through 2016 using Bloomberg data. We selected these years, in part, because the bankruptcies were more likely to be resolved so that their effects on the Trust Fund could be assessed. We also analyzed data and documentation on commercially-insured and self-insured coal operators, and examined workers' compensation insurance practices in four of the nation's top five coal producing states. In addition, we interviewed DOL officials, coal mine operators, and insurance company representatives, among others. In November 2021, we interviewed DOL officials to obtain information on actions taken to implement the self-insurance related recommendations we made in February 2020 and we also reviewed agency documentation. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards.

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<sup>4</sup>NIOSH studies found increases in the prevalence of black lung disease among long-tenured Appalachian coal miners and have documented hundreds of miners with the most severe form of the disease, progressive massive fibrosis, receiving care at two clinics in Kentucky and Virginia. See D.J. Blackley, L.E. Reynolds, C. Short, R. Carson, E. Storey, C.N. Halldin, and A.S. Laney, "Progressive Massive Fibrosis in Coal Miners From 3 Clinics in Virginia," *Journal of the American Medical Association*, 319(5):500-501 (February 6, 2018), and D.J. Blackley, J.B. Crum, C.N. Halldin, E. Storey, and A.S. Laney, "Resurgence of Progressive Massive Fibrosis in Coal Miners — Eastern Kentucky 2016," *Morbidity and Mortality Weekly Report*, 65:1385-1389 (December 16, 2016).

<sup>5</sup>GAO-20-21 and GAO-18-351.

### The Black Lung Disability Trust Fund Faces Financial Challenges

In May 2018, we reported that the Trust Fund faces financial challenges.<sup>6</sup> The Trust Fund's expenditures have consistently exceeded revenue and it has essentially borrowed with interest from the Department of the Treasury's general fund almost every year since 1979, which was its first complete fiscal year.<sup>7</sup> In fiscal year 2021, the Trust Fund had to borrow about \$2.3 billion to cover its expenditures, which included debt and interest repayments, according to the Department of Labor.<sup>8</sup> In May 2018, we reported that Trust Fund debt could exceed \$15 billion by 2050.<sup>9</sup>

Trust Fund revenue is primarily obtained through a tax on coal produced and sold domestically, which we refer to in this statement as the coal tax.<sup>10</sup> The coal tax rate has varied over the years. From 1986 through 2018, the coal tax rate was \$1.10 per ton of underground-mined coal and \$0.55 per ton of surface-mined coal, up to 4.4 percent of the sales price. In 2019, the rate of the coal tax decreased to \$0.50 cents and \$0.25 cents per ton of underground-mined and surface-mined coal, respectively, up to 2 percent of the sales price. In 2020 through 2021, the rate of the coal tax increased to pre-2019 levels. Beginning in 2022, the coal tax is scheduled to decrease again to 2019 levels. With less revenue from the coal tax, the Trust Fund will likely need to borrow more from Treasury's general fund.

To pay benefits to coal miners disabled by black lung, federal law generally requires coal mine operators to secure their black lung benefit liability. Operators may purchase coverage from commercial insurance companies, or may self-insure. A self-insured coal mine operator assumes the financial responsibility for providing black lung benefits to its eligible employees by paying claims as they are incurred. Operators are

<sup>6</sup>GAO-18-351.

<sup>7</sup>Under federal law, when necessary for the Trust Fund to make relevant expenditures, funds are appropriated to the Trust Fund as "repayable advances," and then those advances must be repaid with interest to the general fund of the U.S. Treasury. 26 U.S.C. § 9501(c). For reporting purposes, we refer to this process as "borrowing" from Treasury's general fund, which is distinct from the borrowing authority provided by law to some agencies. According to the Treasury, the general fund includes assets and liabilities used to finance the daily and long-term operations of the U.S. government as a whole.

<sup>8</sup>According to DOL's fiscal year 2021 agency financial report, the net position of the Trust Fund continued to decline in fiscal year 2021.

<sup>9</sup>GAO-18-351.

<sup>10</sup>The coal tax is imposed on the sale of all domestically produced coal with two exceptions: (1) lignite coal and (2) exported coal.

permitted to self-insure if they meet certain DOL conditions. For instance, operators applying to self-insure must secure collateral in the form of an indemnity bond, deposit or trust, or letter of credit in an amount deemed necessary and sufficient by DOL to secure their liability.<sup>11</sup>

Coal operator bankruptcies have further strained Trust Fund finances. We reported in February 2020 that the bankruptcies of some self-insured operators that occurred from 2014 through 2016 led to the transfer of \$865 million in estimated benefit responsibility to the Trust Fund, according to DOL (see table 1).<sup>12</sup> This may occur when the amount of collateral DOL requires from a self-insured coal operator does not fully cover the operator's benefit responsibility should the operator become insolvent. For example, the collateral DOL required from Alpha Natural Resources was about \$12 million and approximately \$494 million of estimated benefit liability was transferred to the Trust Fund, according to DOL.

**Table 1: Self-Insured Coal Mine Operator Bankruptcies That Affected the Black Lung Disability Trust Fund, Filed from 2014 through 2016**

Coal operator	Amount of collateral at time of bankruptcy	Estimated benefit liability transferred to the Trust Fund	Estimated number of beneficiaries for whom liability has been transferred to the Trust Fund <sup>a</sup>
Alpha Natural Resources	\$12 million	\$494 million	1,839
James River Coal Company	\$0.4 million	\$141 million	490
Patriot Coal	\$15 million	\$230 million	993
<b>Total</b>	<b>\$27.4 million</b>	<b>\$865 million</b>	<b>3,322</b>

Source: GAO presentation of Department of Labor data. | GAO-22-105546

<sup>a</sup>These totals include claims in active pay status as of September 2019, and estimates of newly awarded claims in fiscal year 2020 and into the future, according to the Department of Labor.

Since 2016, several other self-insured operators have also filed for bankruptcy, according to DOL. For instance, the bankruptcies of Westmoreland Coal and Murray Energy, which occurred in October 2018 and October 2019, respectively, will lead to the transfer of about \$61.1 million in additional estimated benefit responsibility to the Trust Fund, according to DOL officials.

<sup>11</sup>A letter of credit may only be used in conjunction with another acceptable form of collateral.

<sup>12</sup>GAO-20-21.

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**Limited DOL Oversight Increased Financial Risk to the Black Lung Disability Trust Fund**

In February 2020, we reported that DOL's limited oversight of coal mine operator insurance exposed the Trust Fund to additional financial risk.<sup>13</sup> Specifically, we found that DOL did not (1) estimate future benefit liability when setting the amount of collateral required to self-insure, (2) regularly review operators to assess whether the required amount of collateral should change, or (3) always take action to protect the Trust Fund by revoking an operator's ability to self-insure as appropriate.

DOL began implementing a new self-insurance process in July 2019. However, we found that the new process lacked procedures for its planned annual renewal of self-insured operators and for resolving coal operator appeals should operators dispute DOL collateral requirements.<sup>14</sup> We noted that this could hinder DOL from revoking operators' ability to self-insure should they not comply with DOL requirements. To strengthen its oversight of self-insured operators, we recommended, among other things, that DOL:

- develop and implement procedures for coal mine operator self-insurance renewal that clarifies how long an operator is authorized to self-insure, when an operator must submit its renewal application and supporting documentation, and the conditions under which an operator's self-insurance authority would not be renewed, and
- develop and implement procedures for self-insured coal mine operator appeals that identify timelines for self-insured operators to submit documentation supporting their appeals and that identify a goal for how much time DOL should take to make appeals decisions.

We stated that establishing clear self-insurance renewal procedures could better position DOL to take action to protect the Trust Fund should an operator not submit its renewal application and supporting documentation, or comply with DOL's collateral requirements. In addition, procedures that identify time lines for self-insured operators to submit documentation supporting their appeals, and that identify a goal for how much time DOL should take to make appeals decisions could help to ensure that DOL is able to revoke an operator's ability to self-insure, when warranted.

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<sup>13</sup>GAO-20-21.

<sup>14</sup>GAO-20-21.

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**DOL Took Steps to Implement GAO's Recommendations, but Was Hindered by the COVID-19 Pandemic and a New Review**

In February 2020, shortly before we last reported to this committee, DOL sent letters to 14 self-insured operators asking them to provide about \$251 million in total collateral.<sup>15</sup> Half of the coal operators provided DOL's requested collateral, and the remaining half appealed, according to DOL. DOL officials said that five operators appealed based on the amount of collateral DOL requested and the other two operators appealed based on DOL's finding that the operators no longer met DOL requirements to self-insure. As a result, DOL did not secure about \$186 million in requested collateral from the five self-insured operators that appealed DOL's requested collateral. Table 2 shows the status of the 14 self-insured coal operators as of November 2021 including the amount of collateral DOL requested and secured (if applicable) and operators' estimated benefit liabilities.

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<sup>15</sup>GAO, *Black Lung Benefits Program: Oversight Is Needed to Address Trust Fund Solvency Strained by Bankruptcies*, GAO-20-438T (Washington, D.C.: Feb. 26, 2020).

**Table 2: Self-Insured Coal Mine Operators as of November 2021**

Coal mine operator	Amount of collateral DOL requested in February 2020, if applicable	Amount of collateral secured by operator as of November 2021	Most recent actuarial estimate of black lung benefit liabilities
<i>Coal mine operators that provided DOL's requested collateral</i>			
Coal mine operator #1	\$16,754,500	\$17,197,698	\$23,935,000
Coal mine operator #2	\$3,296,856	\$3,301,360	\$3,296,856
Coal mine operator #3	\$1,364,354	\$1,364,354	\$1,364,354
Coal mine operator #4	\$1,132,719	\$1,132,719	\$1,132,611
Coal mine operator #5	\$1,045,502	\$1,045,502	\$1,230,002
Coal mine operator #6	\$634,100	\$634,100	\$746,000
Coal mine operator #7	\$1,610,511 (later corrected by DOL to \$557,793)	\$557,793	\$656,227
<i>Coal mine operators that appealed</i>			
Coal mine operator #8	\$78,062,566	\$6,900,000	\$111,517,952
Coal mine operator #9	\$65,678,185	\$2,500,000	\$93,825,978
Coal mine operator #10	\$40,411,000	\$8,400,000	\$57,730,000
Coal mine operator #11	\$39,781,129	\$21,000,000	\$58,801,613
Coal mine operator #12	\$2,079,057	\$1,000,000	\$2,079,057
Coal mine operator #13	Not applicable. No longer met DOL requirements to self-insure and told to obtain commercial coverage	\$24,797,512	\$21,969,863
Coal mine operator #14	Not applicable. No longer met DOL requirements to self-insure and told to obtain commercial coverage	\$400,000	\$20,222

Source: OIG presentation of Department of Labor data. | GAO-22-105546

Note: The self-insured arrangements can include those that cover legacy federal black lung liabilities (e.g., formerly employed miners only). This may arise when an operator no longer actively mines coal or is using commercial insurance for its current mining operations and self-insurance for its past operations. Self-insured operators and their subsidiaries may use a combination of self-insurance and commercial insurance to cover their liabilities, according to the Department of Labor. Numbers rounded to nearest dollar.

In addition to the 14 operators DOL contacted in February 2020 there are three additional self-insured operators, according to DOL.<sup>19</sup> DOL officials said two of these operators provided actuarial estimates they could not use to assess how much collateral they should require. DOL officials said they did not need to reassess the collateral required for the remaining operator because they had done so in 2019. DOL's 2019 review estimated that the operator's black lung liability was about \$163 million

<sup>19</sup>As of November 2021, a total of 17 coal operators are self-insured according to DOL officials.

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and its required collateral was just over \$24 million, which the operator secured.

DOL officials said their ability to resolve appeals was hindered by the COVID-19 pandemic as they and coal operator staff adjusted to different working conditions and experienced challenges in obtaining and processing needed documentation. As a result, DOL officials said that they suspended their review of coal operator appeals throughout 2020.

In December 2020, DOL issued a preliminary bulletin and sought public comment on updated guidelines for coal operator self-insurance.<sup>17</sup> This bulletin was the culmination of DOL's approximately 5-year effort to reform the self-insurance program.<sup>18</sup> The guidelines included actions that would have addressed our recommendations. For instance, DOL specified that it would authorize operators to self-insure for a period of one year (after which an operator would be required to submit a self-insurance renewal application), and it set a goal to resolve coal operator appeals within 90 days after receiving supporting documents or meeting with the operator to discuss their concerns. Additionally, DOL stated that it would set collateral requirements based on an operator's actuarial estimated benefit liabilities and risk of insolvency, and reassess the collateral requirements quarterly based on review of an operator's financial statements.

In February 2021, DOL rescinded the preliminary bulletin due to a review of the program by the current administration, according to DOL officials.<sup>19</sup> Since that time, DOL officials said they have taken no further actions to resolve appeals or to collect any additional collateral or other information from self-insured operators. As a result, DOL has not identified and collected necessary collateral to protect the Trust Fund. Moreover, another coal operator, Lighthouse Resources, filed for bankruptcy in December 2020; this could result in a transfer of about \$2.4 million in estimated benefit responsibility to the Trust Fund, according to DOL. In

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<sup>17</sup>Department of Labor, Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation BLBA Bulletin No. 21-01, *DCMWC Self-Insurance Process Guidelines* (Washington, D.C., Dec. 7, 2020).

<sup>18</sup>DOL officials said that beginning in summer 2015 they stopped permitting any new coal mine operators to self-insure as the agency worked with auditors, economists, and actuaries to develop new procedures for self-insurance.

<sup>19</sup>DOL issued a public notice withdrawing its request for comments on its preliminary bulletin, *Black Lung Benefits Act Self-Insurance: Withdrawal of Guidance*, 86 Fed. Reg. 8806 (Feb. 9, 2021).

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addition, the two operators DOL said no longer met their requirements to self-insure almost 2 years ago remain self-insured. DOL officials also stated that disputes are ongoing with two self-insured operators about their actuarial estimated benefit liabilities and that it has not assessed whether the amount of collateral they required from these operators is appropriate.

As of November 2021, DOL officials said the administration's review is complete, but could not describe any anticipated changes to coal operator self-insurance going forward, other than that they anticipate seeking public comment on updated self-insurance guidelines in the coming months. It is unclear how long this process may take. Given that the Trust Fund had to borrow about \$2.3 billion from the Treasury in fiscal year 2021, and that the coal tax—the Trust Fund's primary revenue source—may decrease beginning in 2022, we reiterate the need for DOL to address our previous recommendations.

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Chairwoman Adams, Ranking Member Keller, and Members of the Subcommittee, this concludes my prepared statement. I would be happy to respond to any questions you may have at this time.

If you or your staffs have any questions concerning this testimony, please contact me at (202) 512-4769 or [costat@gao.gov](mailto:costat@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Blake Ainsworth (Assistant Director), Justin Dunleavy (Analyst in Charge), and Lauren Shaman. Also contributing to this testimony were Caitlin Cusati, Alex Galuten, Jeffrey Miller, Almata Spencer, and Kate van Gelder.

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## **Attachment 17**

<b>At a Glance</b>			
<b>H.R. 6102 , Black Lung Benefits Improvement Act of 2022</b>			
<b>As ordered reported by the House Committee on Education and Labor on March 16, 2022</b>			
By Fiscal Year, Millions of Dollars	2022	2022-2027	2022-2032
Direct Spending (Outlays)	<b>0</b>	<b>36</b>	<b>74</b>
Revenues	*	*	*
Increase or Decrease (-) in the Deficit	*	<b>36</b>	<b>74</b>
Spending Subject to Appropriation (Outlays)	<b>0</b>	*	not estimated
Statutory pay-as-you-go procedures apply?	<b>Yes</b>	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2033?	<b>&lt; \$5 billion</b>	Contains intergovernmental mandate?	<b>No</b>
		Contains private-sector mandate?	<b>Yes, Under Threshold</b>
* = between -\$500,000 and \$500,000.			
<b>The bill would</b>			
<ul style="list-style-type: none"> <li>• Increase black lung benefits paid to miners and their survivors</li> <li>• Make it easier for miners to substantiate their claims using computerized tomography (or CT) scans</li> <li>• Increase the maximum penalty for coal operators who violate self-insurance rules</li> <li>• Codify existing regulations and practices for paying black lung benefits</li> </ul>			
<b>Estimated budgetary effects would mainly stem from</b>			
<ul style="list-style-type: none"> <li>• Increasing benefits for miners and survivors</li> <li>• Increasing the number of people who receive black lung benefits</li> <li>• Reimbursing some attorneys' fees associated with black lung claims</li> </ul>			
<b>Areas of significant uncertainty include</b>			
<ul style="list-style-type: none"> <li>• The number of additional claims that would be paid because of changes to rules for medical evidence</li> </ul>			
<b>Detailed estimate begins on the next page.</b>			

See also CBO's *Cost Estimates Explained*, [www.cbo.gov/publication/54437](http://www.cbo.gov/publication/54437); *How CBO Prepares Cost Estimates*, [www.cbo.gov/publication/53519](http://www.cbo.gov/publication/53519); and *Glossary*, [www.cbo.gov/publication/42904](http://www.cbo.gov/publication/42904).

**Bill Summary**

H.R. 6102 would increase benefits for miners, and their survivors, who are affected by coal workers’ pneumoconiosis (commonly referred to as black lung disease) or other lung diseases and would allow certain attorneys’ fees to be paid by the federal government. In addition, the bill would expand use of computerized tomography (CT) scans as medical evidence to substantiate miners’ black lung claims, resulting in more people receiving benefits. Some of those costs would be paid by responsible coal operators.

**Estimated Federal Cost**

The estimated budgetary effect of H.R. 6102 is shown in Table 1. The costs of the legislation fall within budget function 600 (income security).

**Table 1.**  
**Estimated Budgetary Effects of H.R. 6102**

	By Fiscal Year, Millions of Dollars												2022-2027	2022-2032
	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032			
	<b>Increases in Direct Spending</b>													
Estimated Budget Authority	0	9	6	7	7	7	7	7	8	8	8	8	36	74
Estimated Outlays	0	9	6	7	7	7	7	7	8	8	8	8	36	74

Enacting H.R. 6102 would increase revenue by an insignificant amount over the 2023-2032 period. The bill also would increase spending subject to appropriation by an insignificant amount over the 2023-2027 period.

**Basis of Estimate**

For this estimate, CBO assumes that H.R. 6102 will be enacted by the end of calendar year 2022. Estimated outlays are based on historical spending patterns for the affected programs.

**Direct Spending**

Under current law, miners, and their survivors, affected by black lung and related diseases can receive benefits if their disease is connected to coal mining. If the responsible mine operator cannot pay benefits, the federal government pays benefits out of the Black Lung Disability Trust Fund (BLDTF). H.R. 6102 would increase direct spending chiefly by increasing benefits for people who are disabled and their survivors, increasing the number of miners who could claim those benefits, and reimbursing attorneys for certain legal fees. Over the 2023-2032 period, CBO estimates the bill would cost \$74 million.

**Benefit Rates.** H.R. 6102 would increase the payment for disability and survivors’ benefits, retroactively starting on January 1, 2022, by about 4 percent, and would increase those benefits each year based on the change in the Consumer Price Index. CBO estimates that the

number of people receiving black lung benefits is roughly 25,000 annually; benefits for about two-thirds of those people will be paid out of the BLDTF. On that basis, and using the inflation rates that underlie CBO's baseline, we estimate that enacting this provision would increase direct spending by \$53 million over the 2023-2032 period.

**Attorneys' Fees.** Under the bill, attorneys for people applying for black lung benefits would be reimbursed up to \$1,500 for legal fees if the claimant is awarded benefits by a district director and up to \$3,000 if benefits are awarded by an administrative law judge. Initially, those amounts would be paid by the federal government, but mine operators would be required to reimburse the Department of Labor (DOL) if the operators are also responsible for the claimants' black lung benefits. Using information from the department, CBO estimates that, on net, the bill would increase direct spending from the BLDTF by \$15 million over the 2023-2032 period for attorneys' fees.

**Medical Evidence.** More weight is placed on some types of evidence when evaluating claims for black lung benefits during the adjudication process. Under H.R. 6102, pneumoconiosis or related diseases diagnosed by a CT scan would be weighted equally as other forms of medical evidence in certain cases. Additionally, DOL would be obligated to authorize those scans in certain cases; the cost of authorized medical examination and tests would ultimately be paid for by the BLDTF or responsible coal operator. Because the early stages of pneumoconiosis and related diseases are more likely to be identified through CT scans than other methods, CBO expects that 60 additional people would be awarded black lung benefits over the 2023-2032 period. The federal government would pay the benefits for about 40 of those people through the BLDTF. CBO estimates that the cost of additional scans and benefits would be \$6 million over the 2023-2032 period.

**Criminal Penalties.** CBO estimates that H.R. 6102 would increase collections of criminal penalties, which are recorded as revenues, as discussed below under the heading "Revenues." Criminal penalties are deposited in the Crime Victims Fund and later spent without further appropriation action. CBO estimates those additional penalties would increase direct spending by an insignificant amount over the 2023-2032 period.

**Other Provisions.** H.R. 6102 would amend the descriptions of eligibility for black lung benefits and the Office of Workers' Compensation Programs. Because these provisions would codify existing practices and procedures, they would not affect federal spending.

#### **Revenues**

Under current law, people who make false statements or submit false claims to obtain black lung benefits can face criminal fines and imprisonment. H.R. 6102 would encourage additional investigations of violators, explicitly define the types of violations that may result in fines, and increase the maximum prison sentence for making a false statement. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without

further appropriation action. CBO estimates that those increased penalties would not be significant.

In addition, H.R. 6102 would increase the maximum daily civil penalty from \$3,011 to \$25,000 if coal mine operators fail to maintain required security or insurance. Finally, the bill would expand the list of corporate executives and entities that can be held jointly or severally liable in the event of a failure to pay black lung benefits; the liability would extend beyond bankruptcy filings or other permanent abandonment. Those fines also are recorded as revenues. Given that DOL has not assessed such penalties in recent years, CBO expects those changes would not increase revenues by a significant amount.

#### **Spending Subject to Appropriation**

The bill would require DOL to issue new regulations concerning self-insurance, procedures for disqualification of attorneys, and discovery sanctions. The bill also would require the Social Security Administration to make earnings information for living or deceased miners available to DOL in electronic form rather than on paper. CBO estimates that the cost of those provisions would be insignificant over the 2023-2032 period.

#### **Uncertainty**

CBO's estimates of the budgetary effects of H.R. 6102 are subject to uncertainty. In particular, the number of claims that would be accepted as a result of new rules concerning medical evidence could differ from CBO's projections. Therefore, the cost of benefits could be higher or lower than CBO estimated.

#### **Pay-As-You-Go Considerations**

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in Table 1.

#### **Increase in Long-Term Deficits**

CBO estimates that enacting H.R. 6102 would not increase on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2033.

#### **Mandates**

H.R. 6102 would impose a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by increasing the amount and availability of benefits paid under the Black Lung Benefits Act. Benefits currently are paid in part by the employers of claimants; therefore, the changes in the bill would increase the cost of an existing mandate. Because of the small number of additional new beneficiaries, CBO estimates that the cost of the mandate

would not exceed the private-sector threshold established in UMRA (\$184 million in 2022, adjusted annually for inflation).

The bill contains no intergovernmental mandates as defined in UMRA.

**Estimate Prepared By**

Federal Costs: Meredith Decker

Revenues: Omar Morales

Mandates: Andrew Laughlin

**Estimate Reviewed By**

Elizabeth Cove Delisle  
Chief, Income Security Cost Estimates Unit

Joshua Shakin  
Chief, Revenue Estimating Unit

H. Samuel Papenfuss  
Deputy Director of Budget Analysis

Theresa Gullo  
Director of Budget Analysis

[Whereupon, at 3:45 p.m., the hearing was adjourned.]

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